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Supreme Court, U.S.
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No. 87-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MICHAEL K. DEAVER,
Petitioner,

v.

CABLE NEWS NETWORK, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a portion of criminal *voir dire* proceedings that involves inherently sensitive and personal questions to prospective jurors may be conducted *in camera* to ensure the maximum disclosure of information necessary to protect a defendant's constitutional right to a fair and impartial jury, when the media's interest in attending those proceedings is accommodated by the availability of daily transcripts.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A., pp. 1a - 14a, infra) summarily reversing the district court's chosen method of conducting voir dire is unreported. The decisions of the district

court that resulted in the voir dire procedure so utilized, as well as the order appealed from, were issued orally from the bench. (See Pet. App. E - I, pp. 23a - 81a, infra).

JURISDICTION

The order implementing the court of appeals' opinion was entered on July 15, 1987. (Pet. App. B, pp. 15a - 17a, infra). A timely petition for rehearing and a suggestion for rehearing en banc were both denied by orders dated August 11, 1987. (Pet. App. C, pp. 18a - 19a, infra; Pet. App. D, pp. 20a - 22a, infra). The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial, by an impartial jury . . ..

STATEMENT

This is a case about the proper balancing of two important constitutional rights: the right of the media to attend voir dire proceedings in a criminal case and the right of the defendant in that case to receive a fair trial by an impartial jury. [1] The decision below struck this constitutional balance completely in favor of the media despite the clear recognition by all parties participating in the trial proceedings

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[1] The background for this balancing is the highly publicized criminal trial of petitioner Michael K. Deaver ("Deaver") on five counts of perjury. The history of these criminal charges is discussed more fully in a previous petition for a writ of certiorari filed, and still pending, in this Court. See Deaver v. United States of America, No. 86-2026.

(including the trial judge) that limited in camera voir dire was necessary to ensure a fully candid, and thus fair, jury selection (see, e.g., Pet. App., p. 75a, infra), and despite the extraordinary lengths undertaken by the district court (including making available daily transcripts of the voir dire proceedings in question) to accommodate the media's rights while at the same time endeavoring to protect Deaver's Sixth Amendment right. It is those extraordinary accommodations by the district court that make this case dramatically different from Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984), upon which the court below placed total reliance. It is therefore to those extraordinary accommodations that we now turn.

1. Voir Dire Proceedings Begin In The District Court

On July 13, 1987, the highly publicized and long awaited trial of the criminal charges against Deaver was scheduled to begin. On that day the district court began the voir dire proceedings intending to interrogate the jurors in four separate stages. First, the jurors would be asked in open court "a few specific questions as a group" (Pet. App. E, p. 25a, infra), and any affirmative answers to those questions would be taken at a bench conference out of public earshot. Id. Second, the jurors would be asked to answer a questionnaire developed by the court and the parties to inquire into matters relevant to the litigation, see Appendix F, which the district court intended to keep "sealed [from public view] at least until the conclusion of the case." (Pet. App. E, p. 26a, infra). Third, some of

the jurors would be brought back to the jury room where, in private, counsel and the court could ask "any further appropriate questions which the answers on the questionnaire suggested." Id. Fourth, the jurors would all return to the courtroom for "certain general questions once again as a group, which [they would] again answer one-by-one at the bench." Id.

The initial stage of the voir dire was completed on the first morning of trial without any complaints from the media. All the jurors' responses to the court's questions were received in private, at a bench conference, where the juror stood facing the judge, surrounded by seven lawyers (four for the prosecution and three for the defendant), a court reporter, and the courtroom clerk. The second stage, during which the jurors completed their questionnaires while the

courtroom was closed, was also completed without any media objections. The third stage of the voir dire was then set to begin after a luncheon recess.

2. Representatives Of The Media Object To The Voir Dire Proceedings, The District Court Modifies Them And The Voir Dire Continues

During that recess, a representative of the media brought the Press-Enterprise I decision to the district court's attention (Pet. App. F, pp. 30a - 33a, infra), and suggested that it warranted changes in the proposed proceedings. The district court agreed and, as a result, made two significant changes in the voir dire. First, the court determined that it could no longer keep the jurors' completed questionnaires completely under seal until the conclusion of the case. Second, the court decided that it likewise could no longer keep completely private the jurors' responses to individual questioning in the

jury room. Accordingly, when the jury panel was reassembled, the judge explained the problem and told them:

> I want you to understand that unless I make findings with respect to your answers to the questions on these questionnaires that entitle you to maintain their privacy, they will not remain private and they will be available to the press to view, as will the transcript of the proceedings that we will follow in the jury room when individual jurors, prospective jurors, are questioned about their answers to the questions on the questionnaire.
>
> If you desire, if you have a special reason for wanting your questionnaire or any portion thereof, to remain sealed from public view, when we adjourn from here to the jury room, please let Marshall Smith know that you would like personally to be heard on the matter before me, and we will make arrangements to make sure that you have an opportunity to ask that your privacy be respected.

(Pet. App. F, pp. 32a - 33a, infra). With the media thus having been granted general access to the jurors' questionnaires and to available daily copy of the transcript of the proceedings in the jury room, the

third stage of the proceedings began in the jury room and continued for the rest of the day.

3. Media Representatives Complain Again, And Further Changes Are Made To The *Voir Dire* Which Then Continues

The next morning, July 14, 1987, representatives of the media reappeared in the district court seeking further relief in the form of requiring the jurors, rather than the parties and the court, to indicate whether supplemental questioning of them concerning the answers to their questionnaires should take place in the jury room or in open court. Once again, the district court "accede[d] to [this] request," (Pet. App. G, p. 38a, *infra*), and told the remaining assembled jurors that they now had to make a choice concerning where they would be questioned during the third stage of the proceedings:

> Those of you who are willing to take the witness stand and answer further questions bearing upon your questionnaires in open court may be excused now to return to the jury lounge. If you will simply leave your name and number with the Marshal, we will send for you when we are ready to have you. Those of you who would prefer to give your follow-up answers having to do with your questionnaires in the jury room remain seated and as soon as the others have been excused, we will proceed to take you into the jury room.

(Pet. App. H, pp. 58a - 59a, infra). All but five jurors decided they wished to be questioned in private. Those five were excused to the jury lounge, and interrogation of the others continued individually in the jury room.

4. Additional Objections Are Raised By The Media, But Denied By The District Court, And The Media Appeals, As The Voir Dire Continues

At the noontime recess, the media again objected to the way the voir dire proceedings were being handled. They complained that the court had not required

those jurors who wished to be questioned in private to make an affirmative request for private questioning, such as by raising their hands, but rather had permitted them to do so by remaining seated. (Pet. App. I, p. 64a, infra). The media also argued that before the court could grant a juror's request for private questioning, it had to interrogate that juror in order to make sure that the "privacy interests" at issue were "sufficiently sensitive" to warrant granting the request. Id. at 65a. Finally, the media requested permission to sit in the courtroom while individual jurors were called into the jury room from the larger group of jurors also sitting in the courtroom. (Id. at 66a). The trial judge granted the media's request to sit silently in the courtroom (id. at 67a), but denied their remaining requests. In doing so, he stated:

> I am not going to alter the procedure that I have followed and I am reinforced in my conviction that the procedure is a proper one which fairly balances the interests involved here by the fact that both parties, prosecution and defense, here seem to feel that a fair trial is most likely to result by the procedures that I have adopted.

(Pet. App. I, p. 75a, infra). Unsatisfied by this result, the media representatives immediately appealed while voir dire proceedings continued.

5. The Court of Appeals Issues An Immediate Order To Show Cause, Briefs Are Filed And Oral Argument Is Held While Voir Dire Proceedings Are Suspended

Acting on the media representatives' appeal, late in the afternoon of July 14th, the United States Court of Appeals for the District of Columbia Circuit issued an Order To Show Cause why the voir dire procedures utilized by the district court should not be summarily reversed on the authority of Press-Enterprise Co. v.

Superior Court of California, 464 U.S. 501 (1984). The Court of Appeals directed any party desiring to show such cause to file a brief in support of the district court's actions by 10:00 a.m. the next day. Pursuant to this directive, the next morning both the independent counsel representing the United States and counsel for Deaver filed briefs supporting the procedures that had been followed in the trial court. 2/

The Court of Appeals held oral argument on its Order To Show Cause less than two hours after the briefs in support of the district court's procedures had been filed, and less than twenty-four hours after the media representatives had

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2/ After the Court of Appeals issued its Order to Show Cause, the district court suspended any further voir dire proceedings pending the Court of Appeals' ruling.

noticed their appeal. During the course of oral argument, counsel for the media requested "that the Court [of Appeals] supply some guidelines to the District Judges as to what should be done . . . [because] the District Court and other District judges would benefit enormously from some guidance . . . as to the standard that you apply . . . in determining what could be open." (Tr. 7/15/87 at 15-16). In response, the court of appeals noted that this appeal was "an urgent proceeding . . . and [that contrarily] the development of guidelines suggest[s] reflection and deliberations." (Id. at 16). After hearing argument from all parties, the court took the appeal under advisement.

6. The Court of Appeals Summarily Reverses The District Court And Directs That The Voir Dire Be Conducted Differently

Later in the afternoon that same day, July 15, 1987, the court of appeals issued an opinion and order summarily reversing the district court's voir dire procedures. The court of appeals' opinion was based entirely on that court's reading and application of Press-Enterprise Co. v. Superior Court of California, supra. It found that Press-Enterprise controlled the issue before it and required that the district court's actions in holding a portion of the voir dire proceedings in camera had to be "necessitated by a compelling governmental interest, and . . . narrowly tailored to serve that interest." (Pet. App. A, p. 6a, infra). The court then held:

> - [f]irst, [that] the District Court had no evidence in the record and made no findings that public interrogation of

any individual member of the voir dire would "touch on deeply personal matters that [the juror] has legitimate reasons for keeping out of the public domain (Pet. App. A, p. 9a, infra);

- [s]econd, [that] the District Court did not, as Press-Enterprise demands, "requir[e] the prospective juror[s] to make an affirmative request" for an in camera voir dire interview (id. at 12a); and

- [t]hird, [that] the District Court acted apparently without considering alternatives that might minimize the degree of closure (id. at 13a).

On the basis of the foregoing, the court of appeals summarily reversed the district court and remanded the case to the district court with a direction that "voir dire proceedings henceforth . . . be conducted in accordance with [its] opinion." Id. at 14.

7. The District Court Aborts The Trial Proceedings And The Court of Appeals Denies Rehearing

On remand the next day, the district court decided, over the objection of both

the independent counsel and counsel for Deaver, that it simply could not continue with any further voir dire of the jury venire that had been called for service on July 13th. After the jury commissioner's office informed the court that there was an insufficient number of new jurors available to start the entire process anew and that it would take at least three weeks to prescreen another jury pool for service on this case, the trial proceedings that had begun three days earlier were terminated, and a new trial date was tentatively set for October 19, 1987. 3/

3/ The district court set the trial date in order to allow the parties time to seek further review of the court of appeals' decision. The independent counsel had informed the district court that he intended to seek en banc review of the decision, and counsel for Deaver had stated that they intended to petition this Court to review it.

With the luxury of time that was unavailable on the prior expedited and emergency proceedings in the court of appeals, the independent counsel and counsel for Deaver both timely petitioned that court for a rehearing of this appeal, and both suggested that it be reheard en banc because of the extraordinary importance of the issue to the administration of justice in the District of Columbia Circuit. In addition to the arguments raised herein, counsel for Deaver also sought rehearing by demonstrating that the court of appeals had clearly erred in its holdings that (1) that the district court had not considered alternatives to minimize closure -- (since the district court had plainly considered a number of alternatives and adopted most of them to accommodate the media 4/) --

and (2) the district court lacked an adequate basis for determining that the privacy interests at issue were "legitimate" -- (since either Congress or the courts had already fully sanctioned, and thus legitimized, privacy interests in the areas in question [5]). However, on

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[4] See generally Pet. App. F - I.

[5] The subject matters of the following "deeply personal" questions on the questionnaire have already been determined to be fully legitimate candidates for privacy. The questions about the jurors' political affiliations and beliefs, see Pet. App. J Nos. 6, 7, 27, 28 & 29), involve an area into which Congress itself has already declined to intrude, see 42 U.S.C. § 1973aa-5 (in census surveys of registered voters, "no person shall be compelled to disclose his . . . political party affiliation, or how he voted (or the reasons therefore)", and that is constitutionally protected in its own right. See NAACP v. Alabama, 357 U.S. 449 (1958). The Congress has made a similar judgment with respect to personal questions related to alcoholism or alcohol abuse (Pet. App. J, Nos. 18 & 19), see 42 U.S.C. § 290dd-3 (ensuring confidentiality of records relating to alcoholism or alcohol abuse), and this Court has (Cont'd)

August 11, 1987, without any explanation whatsoever, the petitions for rehearing and suggestions for rehearing en banc were denied. (See Pet. App. C & D). This petition followed.

8. Present Status Of This Case

At present, there is a tentative trial date of October 19, 1987, set in this case. Obviously, if new voir dire proceedings commence at that time and are completed before this Court has had an opportunity to determine whether to review

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recognized the same with respect to medical history information (Pet. App. J, Nos. 16 & 17). See Department of Air Force v. Rose, 425 U.S. 352, 375-376 & n.14 (1976) ("health . . . records are highly personal to the person involved"). Finally, it has long been recognized in the District of Columbia that questions about jurors' experiences with the criminal justice system, (Pet. App. J, No. 21), should be kept private. See United States v. Ridley, 412 F.2d 1126 (D.C. Cir. 1969); CPI, Trial Manual, Vol. II § 16.6 (1984).

this issue, this petition likely will become moot as far as Deaver is concerned. If the media respondents prepare and file their responses to this petition promptly (which they showed the ability to do when their interest was on the line in the court of appeals), then this Court likely can rule on this petition in the routine course of its business before October 19th. If respondents do not act quickly, petitioner hereby asks this Court to expedite its consideration of this petition so that action can be taken thereon before that critical date.

REASONS FOR GRANTING THE WRIT

This case presents this Court with a square conflict between two constitutional guarantees: the media's qualified right to attend judicial proceedings and the criminal defendant's absolute right to a

fair trial before an impartial jury. Balancing such competing constitutional rights has always been an important function of this Court of last resort, and this alone would be ground enough to grant this petition. But here there is even more at stake, for the court of appeals not only misbalanced these important rights below, it altered their very nature. As a result of the decision below, it is the media's right which is absolute and the defendant's which is qualified: a criminal defendant now has a constitutional right to select a fair and impartial jury only to the extent that such selection process does not infringe in any way on the media's right to be present at the time. It is this novel constitutional jurisprudence, which conflicts with prior holdings of this Court and of other federal circuit courts, that warrants this Court's review.

I. A Criminal Defendant's Sixth Amendment Right To A Fair And Impartial Jury Is The Most Important Factor To Be Considered By Courts Reviewing Criminal Voir Dire Proceedings, Not A Factor To Be Ignored As It Was By The Court Below

This Court has already recognized, in precisely this context, that "no right ranks higher than the right of an accused to a fair trial." Press-Enterprise I, 464 U.S. at 508. It is equally clear that voir dire represents a primary means of protecting that right. See Patton v Yount, 467 U.S. 1025 (1984). Indeed, the importance of a trustworthy voir dire process was only recently underscored by this Court in McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984):

> One touchstone of a fair trial is an impartial trier of fact -- "a jury capable and willing to decide the case solely on the evidence before it." Smith v. Phillips, 455 U.S. 209, 217 (1982). Voir dire examination serves to protect that right by exposing possible

> biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their preemptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.

Accord, Swain v. Alabama, 380 U.S. 202, 218-221 (1965).

Neither the media nor the court below knew or understood the issues involved in Deaver's underlying criminal case to the extent that the prosecution, the accused and the trial court did. The latter all concluded that the manner in which the voir dire proceedings below were conducted was essential to ensure a fair trial for Deaver. Yet, despite this unanimity, this factor was neither given any deference by, nor even considered by, the court below, which focused entirely upon the media's interest in open proceedings and the

possibility that prospective jurors' privacy interests might not be legitimate. In Press-Enterprise I, this Court expressly recognized that an open voir dire proceeding may threaten either the defendant's Sixth Amendment right to a fair trial or a prospective juror's privacy interests. 464 U.S. at 511. The decision below simply reads the first of these possibilities -- the defendant's constitutional right to trial by a fair and impartial jury -- out of the caselaw. It is now up to this Court to do as the Constitution commands and put it back in.

II. The Press-Enterprise I Standards Relied Upon By The Court Below Apply Only To Instances Of A Complete Denial Of Media Access To Information, Not To The Mere Day's Delay In The Provision Of That Information As In This Case

The decision below was based completely on the strict standards for closure of voir dire proceedings established by this Court in Press-

Enterprise I. But Press-Enterprise I involved the complete closure of voir dire for six months and the total denial of media access to any information about those proceedings. The procedures employed by the trial court in the case below were a far cry from such restrictive measures. Here, the media was given access not only to the jurors' questionnaires that framed the basis for the voir dire but, most importantly, to a daily transcript of the actual voir dire proceedings themselves as well. Thus, the media was not denied access to what transpired at the voir dire proceedings; it was only denied physical presence at those proceedings. In these accommodating circumstances -- strikingly different than the total exclusion of the media in Press-Enterprise I -- the test to be applied to the trial court's actions is much different than the stringent test applied

by the court below.

Such "limitations on the right to access that resemble "time, place and manner' restrictions on protected speech [are] not [to] be subjected to such strict scrutiny," Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 n.17 (1982) (citations omitted); the test in such circumstances is simply "whether the restrictions imposed are reasonable and whether the interests of the [defendant] override the very limited incidental effects . . . on the First Amendment rights." Id. at 616 (Burger, C.J., dissenting). 6/ Under the proper "reasonableness" test, there can be no

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6/ Accord, Press-Enterprise Co. v. Superior Court of California ("Press-Enterprise II"), 106 S.Ct. 2735, 2744-2752 (Stevens, J. dissenting); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 n.18 (1980).

doubt that the voir dire proceedings utilized below were proper. Providing the daily transcript and the jurors' questionnaires to the media reasonably accommodated the media's First Amendment rights, while at the same time protecting the defendant's constitutional right to a fair and impartial jury. As this court noted in Press-Enterprise I, 464 U.S. at 512 (emphasis added). "[w]hen limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time".

III. The Decision Below Is In Clear Conflict With Recent Decisions Of The United States Courts of Appeals For The Fourth And Fifth Circuits Which Have Approved Accommodating The Media's Interests By The Provision Of Transcripts

The decision below is in direct conflict with recent decision by two other

federal circuit courts of appeal. A brief review of those cases reveals the proper approach to constitutional balancing in this area, and the clear need to review the decision below to correct the lack of uniformity now existing in the federal circuits as a result.

First, in In re Greensboro News Co., 727 F.2d 1320 (4th Cir. 1984) the Fourth Circuit considered a case in which a district court had, at the outset of a highly publicized trial involving the murder of Communists by Nazis and Klansmen, ordered the individual voir dire of potential jurors to be held in camera. In order to minimize any adverse consequences of the in camera requirement, however, the district court made clear that the proceedings would be recorded, transcribed, and made fully available to the public, including the news media upon transcription. The Fourth Circuit found

that this method of proceeding effected an appropriate balance between the competing constitutional imperatives at issue herein:

> We start with the premise that claims for First Amendment protection receive especially sympathetic attention and that curtailment of rights of free access to information is the narrow exception to a sweeping general rule. At the same time, absolutism and rigid dogmatic application of concepts, regardless of consequence, are antagonistic to our judicial system. After balancing all the applicable considerations, of principle and of pertinent fact, we are persuaded that, with an unavoidable minimum of interference with freedom of access to information, the district judge has avoided a very real risk of substantial dimunition in the rights of the defendants to a trial by an impartial jury guaranteed by the Sixth Amendment to the Federal Constitution. Certainly, on such a sensitive matter, his determination that a risk to that precious right exists is significant and is neither clearly erroneous nor an abuse of discretion.

727 F.2d at 1322. Nor has this result changed with the advent of Press-Enterprise I. In a supplemental opinion, denying a petition for rehearing after this Court's decision in Press-Enterprise I, the Fourth Circuit reaffirmed its ruling, finding no inconsistency between the two decisions. 727 F.2d at 1328. This Court later denied a request that this decision be reviewed on certiorari. See 469 U.S. 829.

The second recent decision is the Fifth Circuit's opinion, issued just last month in United States v. Edwards, Nos. 86-3298, 86-3495 (July 31, 1987). Although this case involved the media's claimed right of access to the mid-trial in camera examination of jurors about potential misconduct, see slip op. at 2, rather than to voir dire proceedings, its analysis is fully apposite here, for the Fifth Circuit found that "that values of

openness are implicated" in the juror misconduct situation as well. Id. at 7. Accordingly, the Fifth Circuit looked to this Court's decision in Press-Enterprise I and found therein "a framework for accommodating the values served by public access and the practical necessities of judicial administration of jury trials." Id. at 8-9. That framework was the Press-Enterprise I Court's statement "that a trial judge may in the interest of the fair administration of justice, impose reasonable limitations on access," id. (quoting 464 U.S. at 511 n.10), and its suggestion that "[w]hen limited closure is ordered the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time." Id. at 9 (quoting 464 U.S. at 512). In this framework, the Fifth Circuit held that

"the availability of the transcript is the key to 'satisfying the constitutional values of public scrutiny." Id.

When the transcript of in camera proceedings is made available after-the-fact to the media, the only remaining access to information issue, "simply stated, reduces to 'better sooner than later'?" United States v. Edwards, slip op. at 10. The Edwards Court fully and fairly disposed of this issue, however, by reference to the very right that allegedly creates it:

> We recognize the worth of timely news reported on the front page and by contrast, the diminished value of noteworthy, but untimely, news reported on an inside page. Implicit in that assessment, however, is the fair assumption that significant news will be receive the amount of publicity it warrants. The value served by the first amendment right of access is in its guarantee of a public watch to guard against arbitrary, over-reaching, or even corrupt action by participants in judicial proceedings. Any serious indication of such an impropriety

> would, we belive, receive significant exposure in the media even when such news is not reported contemporaneously with the suspect event.

Id. The right recognized by this Court of media access to judicial proceedings like voir dire was not intended, as the court of appeals suggested, to create a side-show for the media to watch a "juror . . . squirm when he is asked . . . questions." (Tr. 7/15/87 at 26 & 27). It was intended to give the media access to information about those proceedings so that the media could act as a check on the proper administration of justice. The media was given complete access to that information, through the transcripts and questionnaires provided, in the voir dire proceedings below. As the Fourth and Fifth Circuits have held, the media was entitled to no more.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 26, 1987

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member in good standing of the Bar of this Court and that I caused three copies of the foregoing Petition For A Writ of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit to be delivered by hand, this 26th day of August 1987, to each of the following individuals:

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APPENDIX A

WILL BE PRINTED AT A LATER DATE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5245

Cable News Network, Inc., Capitol Cities/ABC,Inc., CBS, Inc., and National Broadcasting Company, Inc.,

Appellants

v.

United States of America

and

Michael K. Deaver

---

and consolidated case

Appeal from the United States District Court for the District of Columbia ([Criminal] Action No. 87-096)

On Motions for Summary Reversal

Argued July 15, 1987
Filed July 15, 1987

Timothy B. Dyk, Kevin T. Baine and David E. Kendall were on appellants' motions for summary reversal.

Whitney North Seymour, Jr., Herbert Miller, Jr., Randall J. Turk and Stephen L. Braga were on appellees' oppositions to appellants' motions for summary reversal.

United States v. Deaver, No. 87-5245 & Consolidated Case

Before: STARR and SILBERMAN, Circuit Judges, and McGOWAN, Senior Circuit Judge

Per Curiam: We have for resolution a motion by several representatives of the news media which are seeking to cover and report on an ongoing criminal trial. They seek summary reversal of an order entered by the District Court on July 14, 1987 denying their request that voir dire of prospective jurors be conducted in open court.

The events that gave rise to this motion began with the distribution by the District Court of a questionnaire containing approximately forty questions to prospective jurors. The responses to these questionnaires raised concerns on the part of the trial judge that many questions involved matters of personal privacy. On the basis of this concern, the District Judge refused appellants'

return at that time to the jury lounge. Those who preferred questioning in private were asked to remain seated. Five of the approximately thirty prospective jurors volunteered to be questioned in open court.

I.

Appellants contend that the District Court's actions in closing the voir dire proceedings violate the standards for limiting public and press access to criminal voir dire enunciated by the Supreme Court in Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984). We agree and therefore reverse.

The Press-Enterprise Court made it abundantly clear that the process of juror selection in a criminal trial is of vital importance not only to the accused but more broadly to the criminal justice system and the public. After reviewing the rich history and tradition of open

criminal proceedings in English and American courts, the Court concluded that "[t]he open trial . . . plays as important a role in the administration of justice today as it did for centuries before our separation from England." Id. at 508. In articulating the safeguards necessary to protect the "value of openness" in criminal proceedings, id., the Court borrowed from its holding of two years before in Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982):

> [T]he circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

Id. at 606-07, quoted in Press-Enterprise,

464 U.S. at 509-10. Echoing this passage from Globe Newspaper, the Press-Enterprise Court held squarely that in the voir dire setting "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Id. at 510.

In reaching this conclusion, the Press-Enterprise Court set out three conditions necessary to establish that closure of the voir dire is justified. First, trial courts must make findings that an open voir dire proceeding threatens either the defendant's Sixth Amendment right to a fair trial or a prospective juror's privacy interests. Id. at 511. Second, in order to "minimize the risk of unnecessary closure" trial courts should require prospective jurors to make "affirmative request[s]" for

private voir dire examination. Id. at 512. Finally, trial courts must consider whether alternatives to closure are available that will adequately protect the interests of prospective jurors. Id. at 511.

We are obliged to conclude that the holding of Press-Enterprise requires reversal of the District Court's ruling in this case. In addition, we are persuaded that the merits of petitioners' motion are so clear that summary reversal is appropriate. See, e.g., Sills v. Bureau of Prisons, 761 F.2d 792, 793 (D.C. Cir. 1985); United States v. Glover, 731 F.2d 41, 42 (D.C. Cir. 1984) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).

II

The District Court's order fails to meet any of the three conditions articulated in Press-Enterprise for closure of voir dire.

First, the District Court had no evidence in the record and made no findings that public interrogation of any individual member of the voir dire would "touch[] on deeply personal matters that [the juror] has legitimate reasons for keeping out of the public domain." Press-Enterprise, 464 U.S. at 511. Indeed, the District Court expressly declined to make such findings:

> It is not possible for me to exercise discretion in any objective fashion as to what is or is not to be private. Things are private simply because they are private to people. Not on any objective standard. What is sensitive, personal information for each of these [prospective] jury members is a matter which is entirely within their own hearts. They have to decide what is personal, . . . and I

> have to trust to their judgment in deciding whether or not they can . . . reveal the information that they are being asked to reveal.

Excerpt of Proceedings, United States v. Deaver, Cr. No. 87-096 at 10 (D.D.C. July 14, 1987). On the basis of this reasoning, the District Court, having determined that certain voir dire questions "deal[t] with matters which are sensitive, personal, private information," id. at 12, left to the prospective jurors' absolute discretion whether voir dire on matters covered by the questionnaire would take place in public or in camera.

To be sure, the District Court could reasonably have concluded that certain questions contained in the questionnaire may, in individual cases, have called for responses of the "deeply personal" sort contemplated by Press-Enterprise. The trial court believed that no objective standard was available to guide his

determination as to whether a juror's request for private questioning about a particular matter was appropriate. But Press-Enterprise is to the contrary; it requires the trial court to determine whether a juror's request is "legitimate." 464 U.S. at 511. The Press-Enterprise Court recognized that in the case before it some questions, although appropriate to ask prospective jurors, by their nature might have "give[n] rise to legitimate privacy interests of those persons." Id. at 512. Nonetheless, this fact alone was insufficient to justify closure, because the trial court had not balanced the particular interests in privacy expressed by individual jurors against what the Court described as the "value of openness." Id. The District Court in this case likewise failed to make individualized findings that specific

jurors had compelling reasons for wishing to keep private responses to particular questions which, in each case, outweighed the value to the public of an open voir dire. The Press-Enterprise Court made clear that without such findings, sufficiently detailed to permit review at the appellate level, it is "not possible to conclude that closure [is] warranted." Id. at 511 (footnote omitted).

Second, the District Court did not, as Press-Enterprise demands, "requir[e] the prospective juror[s] to make an affirmative request" for an in camera voir dire interview. Id. at 512. (Such a request could, as movants concede, be made in writing). This requirement, the Press-Enterprise Court made clear, is necessary to "ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in

privacy." Id. The District Court, in our view, stood this requirement on its head by permitting prospective jurors to elect closed voir dire simply by remaining mute. If anything, this procedure facilitated closure based on possibly insignificant privacy interests, precisely the prospect the "affirmative request" requirement aims to avoid.

Third, the District Court acted apparently without considering alternatives that might minimize the degree of closure. Cf. id. at 513. By way of obvious example, the District Court could have conducted voir dire in open court, responding to individual expressions of specific concern over particular questions by permitting interrogation in camera where warranted under prevailing law. Although Press-Enterprise expressly contemplates a procedure of this sort, the record

discloses no consideration of such an alternative in this case. See Excerpt at 3.

III

In sum, the District Court failed to abide by the standards set forth in Press-Enterprise for closing voir dire proceedings in criminal cases. The order of the District Court is therefore reversed. Voir dire proceedings henceforth shall be conducted in accordance with this opinion. Mandate shall issue forthwith.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 87-5245 September Term 1986
Misc. 87-0243

Cable News Network, Inc., Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Company, Inc.,

Appellants

v.

United States of America and Michael K. Deaver,

Appellees

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and consolidated case

BEFORE: Starr, Silberman, Circuit Judges; and McGowan, Senior Circuit Judge

O R D E R

Upon consideration of appellants' motions for summary reversal and emergency motions for expedited review and the response thereto and this court's order to show cause and the responses thereto, it is

ORDERED by the court that the order to show cause be discharged. It is

FURTHER ORDERED by the court that the July 14, 1987, district court order

concerning voir dire be summarily reversed for the reasons set forth in our opinion which issued today.

The clerk is directed to issue the mandate herein forthwith.

Per Curiam

FILED JUL 15 1987

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5245 September Term 1986
CA MISC No. 87-00243

UNITED STATES OF AMERICA

v.

FILED
AUG 11 1987

MICHAEL K. DEAVER
CABLE NEWS NETWORK, INC., et al.

Appellants.

AND CONSOLIDATED CASE 87-5246

BEFORE: STARR and SILBERMAN, Circuit Judges; MCGOWAN, Senior Circuit Judge

O R D E R

Upon consideration of the petition for rehearing of appellee United States of America and of the petition for rehearing of appellee Michael K. Deaver, it is

ORDERED, by the Court, that the aforesaid petitions are denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: Robert A. Bonner
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term
CA MISC. No. 87-00243

NO. 87-5245

United States of America

v.

FILED
AUG 11 1987

Michael K. Deaver
Cable News Network, Inc., et al.

Appellants.

AND CONSOLIDATED CASE 87-5246

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D.H. Ginsburg, Circuit Judges; McGowan, Senior Circuit Judge

O R D E R

The suggestions for rehearing en banc of appellees United States of America and Michael K. Deaver have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestions are denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER, CLERK

BY: Robert A. Bonner
Deputy Clerk

Circuit Judge Bork did not participate in this order.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
v.	Cr. No. 87-0096
MICHAEL K. DEAVER.	

TRANSCRIPT OF PROCEEDINGS,
JULY 13, 1987, pp. 13-15

THE COURT: Thank you, Ladies and Gentlemen.

The process we are about to engage in is called voir dire. Its purpose is to assure that the jury ultimately impaneled to hear this case is comprised of people who are unbiased and unprejudiced, who can fairly and impartially decide the facts of the case based solely upon the evidence presented in this courtroom and who will follow my instructions as to the law applicable to the facts shown by that evidence.

The process -- this process of voir dire -- is going to require that you disclose to me and to the lawyers a certain amount of personal information about yourself, which you might otherwise want to keep to yourself.

I assure you that I will do all that is possible in the circumstances to protect your privacy.

Now, I intend that we will proceed as follows: First, I plan to ask you a few specific questions as a group. If you have a "yes" answer to any of those specific questions, simply rise and come to the bench one-by-one, as the U.S. Marshal will direct you to do, and explain to us at the bench in greater detail why your answer is yes to that question. You will then resume your seat.

Next, the U.S. Marshal will hand out questionnaires, which I will ask you to fill out. When you have completed and

signed your questionnaire, return it to the Marshal, who will turn them all over to me. Then one-by-one -- and this will probably not commence until this afternoon -- at least some of you will be brought back to the jury room where, in privacy, counsel and I can ask you any further appropriate questions which your answer[s] on the questionnaire may suggest to us.

Once again, you will resume your seats. The questionnaires, by the way, will be sealed, at least until the conclusion of the case. That means that no one but I and the lawyers can look at them.

Finally, I will ask you certain general questions, once again as a group, which you will again answer one-by-one at the bench as before. The lawyers and I will then confer to decide if any of you should be excused for cause. That is, any legally sufficient reason whatsoever,

although you will not be told at the time of my ruling.

We will then seat twelve jurors in the box. And the lawyers will proceed to exercise their p[er]emptory challenges alternately, beginning with the Government, next the defense, next the Government and so on. As a juror is challenged, he or she will step down and resume a seat in the panel. And when both sides are satisfied with the twelve primary jurors in the box, we will proceed in similar fashion to pick four alternate jurors.

When both the jury and alternates have been selected, all remaining members of the panel, including those who have been excused for any reason, or challenged, will be allowed to return to the jury lounge.

The process will take some time, as you can see, and you will simply have to

be patient while we are concerned with matters that don't involve you personally.

I suggest that in further proceedings, you bring something along to read while you are waiting to answer questions personally.

I'm going to start with my set of initial questions to you as a group. You will recall that what you are to do if you have a "yes" answer to the question is to come to the bench one-by-one, as the Marshal will direct, and explain in greater detail to me and the lawyers.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
v.	Cr. No. 87-0096
MICHAEL K. DEAVER.	

TRANSCRIPT OF PROCEEDINGS,
JULY 13, 1987, pp. 94-97

(Luncheon recess -- 12:40 p.m.)

(Afternoon session -- 3:10 p.m.)

(In open court:)

THE COURT: Ladies and gentlemen, over the noontime recess I have had a matter called to my attention which necessitated that the lawyers and I take up a legal problem in connection with the case.

There will be from time to time these legal problems which will arise and they may from time to time, as I'm sure you will discover, prevent our getting started

precisely on time. I apologize in advance for any delay occasioned by having to deal with these problems. I will just have to ask you to indulge us and I beg your patience in the matter. But they are unavoidable.

The matter that came up was a matter which was called to my attention by a member of the press and necessitates my amending something that I told you earlier this morning; namely, that your answers to the questions on this questionnaire, the questionnaires themselves, will be placed under seal and would be totally private during the pendency of these proceedings until the outcome of the [litiga]tion. I have had called to my attention a recent decision of the Supreme Court which says that a trial judge may not close the proceedings, the voir dire proceedings, to public view except upon rather stringent findings as to the necessity for

maintaining the privacy of certain of those proceedings and it is necessary that I make such findings on the record so that the record is clear as to why I have closed any portion of the proceedings, the voir dire proceedings, from public view.

Consequently, I want you to understand that unless I make findings with respect to your answers to the questions on these questionnaires that entitle you to maintain their privacy, they will not remain private and they will be available to the press to view, as will the transcript of the proceedings that we will follow in the jury room when individual jurors, prospective jurors, are questioned about their answers to the questions on the questionnaire.

If you desire, if you have a special reason for wanting your questionnaire or any portion thereof, to remain sealed from public view, when we adjourn from here to

the jury room, please let Marshal Smith know that you would like personally to be heard on the matter before me, and we will make arrangements to make sure that you have an opportunity to ask that your privacy be respected with respect to any answers on your questionnaires and any answers you may make to questions put to you on the voir dire which takes place in the jury room.

But you should understand that unless I do make those special findings, your questionnaires and your answers to questions will be part of the public record and available to the media and anyone else who desires to examine them.

Does either counsel wish to be heard on the matter?

MR. SEYMOUR: No your Honor.

MR. MILLER: The defense does not, your Honor.

THE COURT: All right. Then we will

at this time adjourn these proceedings to the jury room and Marshal Smith will let you know individually to come back and answer those questions we will pose to you in the jury room, and you of course are invited to make your desire to express yourself as to the privacy of your questionnaires to Marshal Smith and you as a volunteer will be called back whether we had intended to call you back or not. We will adjourn these proceedings to the jury room.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
v.	Cr. No. 87-0096
MICHAEL K. DEAVER.	

TRANSCRIPT OF PROCEEDINGS,
JULY 14, 1987, pp. 2-14

THE COURT: Yesterday evening, after hours, I was approached by Mr. Dyk purporting to represent the television networks, with a demand that the entire voir dire be conducted in open court and in full view of the press. And it is Mr Dyk's position that the Press-Enterprise case, to which we adverted yesterday, entitled them to that relief.

I have reflected overnight on whether or not it has, and I have reread Press-Enterprise several times. Pursuant to Press-Enterprise Company v. Superior Court

of California, 464 U.S. 501, 1984, I find that many questions on the jurors' questionnaire completed by the panel give rise to a compelling interest of the prospective jurors in keeping their answers and their further answers to additional questions of the court and counsel out of the public domain, including but not limited to those questions relating to their political affiliation, their personal and familial experiences with crime and substance abuse and their medical histories.

It is my intention to bring the panel up and to allow the individual panel members to elect whether or not they wish further questioning having to do with their answers to the questions to be conducted in the jury room or in open court. And that will be a proceeding that we will engage in at 10:00 o'clock when we bring up the panel members with last names

beginning with the letters D through K.

Now, do either counsel wish to be heard on that particular proposal?

MR. SEYMOUR: No, Your Honor.

MR. MILLER: No, Your Honor.

THE COURT: All right.

Now, I have acceded, to a very large extent, to the request of Mr. Dyk and the request also echoed on behalf of the Washington Post by Mr. Baine to allow maximum access consistent with a fair trial and the privacy rights of these jurors to the voir dire process.

I do not intend to let any media representatives intervene in this case even for a limited purpose. I will allow, for purposes of whatever appellate review that Mr. Dyk or Mr. Baine choose to seek, both of them as officers of the court, to make a brief representation on the record if they are in disagreement with the procedure that I have proposed.

Mr. Dyk?

MR. DYK? Your Honor, could I ask a question so that I fully understand the procedure that is going to be followed?

THE COURT: Yes.

MR. DYK: As I understand it, what Your Honor said is that if a juror does not object to specific questions being asked on the public record, that that juror will be questioned in open court. Is my understanding of that correct?

THE COURT: You did misunderstand what I had to say. Everything is on the public record, Mr. Dyk. Everything. There isn't anything that is not going to be on the public record. The only question is whether or not they will be out here in open court when they respond to further questions having to do with their answers to the questions on the questionnaire, or will they be in the jury room. And failing a specific objection by

specific individual jurors with respect to the answers that they give in the jury room, if that's where they elect to be questioned, their questionnaires and the transcript of the testimony that they give in the jury room will be made available to the public in due course, due course being the end of the day or whenever the reporter gets through transcribing the proceedings.

MR. DYK: Your Honor, I'm sorry. Maybe I'm a little slow this morning. If a juror does not object, will that juror be questioned in open court?

THE COURT: A juror who is willing to be questioned in open court will be questioned in open court.

MR. DYK: And if a juror says, "I don't want to be questioned in open court," will the entire voir dire for that juror then be held in the jury room?

THE COURT: No. Only that portion

relating to the individual questioning of the jurors, based upon the answers that they have made to the questions on the questionnaire which call for a good deal of sensitive, highly personal information.

MR. DYK: So even as to a juror who raised objections it would only be to that portion which Your Honor determines to be sensitive and the juror believes is sensitive? Am I understanding you?

THE COURT: Well, if I understand your question, the answer is yes. It is the questions on the questionnaire which will be the subject of the interrogation in the jury room. And a good deal of those call for sensitive information not every question or every answer to every question is sensitive for every juror, but there is a high probability that as to each juror there is at least one question which he or she would prefer not to have to utter in open court from the witness

stand.

MR. DYK: And it would only be as to that question about that particular question on the questionnaire that it would be in the jury room rather in open court?

THE COURT: There is no way to bring a juror back out when we deal with each individual question on the questionniare. It's totally an impossible, ponderous procedure.

The questions having to do with the questionnaire will be asked, if the juror desires, in the jury room. The transcript of that proceeding and the jurors questionnaire as completed will be made available at the end of the day, along with the transcript.

MR. DYK: So, Your Honor, if I could to clarify this, if a juror, for example said, "Well, I don't mind questioning in open court about most areas, but with

respect to question 16 asking me if I had any chronic or major health problems, I would prefer to have that done in the jury room," then the questioning of the juror would take place in open court with respect to all areas except that one area?

THE COURT: I will have to determine that on the basis of what the juror says. As a general proposition, questions having to do with the questionnaire -- and I do not know what the jurors are going to regard as being sensitive will take place in the jury room if the prospective juror desires, but the transcript will be made available.

Now, I can't think of any other way to balance the interests of the public and the press to as open a process as there can be, while, nevertheless, protecting legitimate interests of the jurors in privacy.

MR. DYK: Your Honor, I appreciate

the modification of the order. And I think it does, as you suggest, go toward alleviating the concerns that Mr. Baine and I both expressed.

I do have this one remaining area of concern, and that is if a juror suggests that he only has concern about one area of questioning, I'm concerned that the entire questioning of the juror on all areas might take place in the jury room rather than just limited to that one area. And as I understand Your Honor, you haven't made a decision about that yet.

THE COURT: It would depend on, I suppose, the desires of a particular juror. But there is no way to move a juror in and out of the jury room to the witness stand as we come to each question on the questionnaire, as a practical matter, without using six weeks to select a jury in this case. And I think the press' interest in full knowledge of the

nature of the voir dire proceedings is adequately served in those circumstances by making available at the end of the day the transcript of the jurors' answers to the questions, to the extent that I do not make a specific finding that a juror is entitled to withhold that information from the public record and by making the juror's questionnaire as completed by the juror, available, as well, subject to the same conditions, namely that I do not find, or that I find that there is a matter that is just unnecessary to the public record and the juror's right to privacy parallels that.

MR. DYK: Thank you, Your Honor. I think the thing for us to do is -- and I appreciate the modification of the order, and we're grateful for that -- I think the thing for us to do, at least as far as my clients are concerned is to wait and see, and, as we understand the procedure as it

goes forward, if we do have any objection to it, we would appreciate the right --

THE COURT: If you're dissatisfied, you know where to seek succor.

MR. DYK: Well, I hope that if there were dissatisfaction that we could come to your Honor first.

THE COURT: I hope you realize how cumbersome a procedure it is going to be to send each juror who is willing to be interrogated in open court back down to the jury lounge and then send for them individually. That in itself is going to be substantially time-consuming, but I'm prepared to do that.

MR. DYK: I think we should just for the moment see how it works. I don't know whether Mr. Baine or Miss Bang-Jensen might want to say something to your Honor also.

THE COURT: All right.

MR. DYK: They represent different

clients.

MR. BAINE: Thank you, your Honor. My name is Kevin Baine. Yesterday I made a request on behalf of the Washington Post Company that the individual examination of jurors be conducted in the courtroom. This morning I appear on behalf of the Washington Post Company and the New York Times Company.

I will not repeat anything that Mr. Dyk said, although I agree with what he said.

I have a suggestion, based upon what your Honor said. Maybe it's what you had in mind and maybe it's not.

If the jurors were all asked en masse whether any of them object to being questioned about their questionnaire in open court, the court may find at that time that very few jurors identify themselves as people who object. In that event, everything could be conducted in

public. Those who do object at that point can be brought up to the bench for discussion with your Honor and with counsel, and the court at that time could make a determination a specific determination with respect to those jurors, where there is an overriding interest, because I don't think that the mere articulation of an objection by a juror is sufficient. I think that triggers your responsibility to make a finding of an overriding interest.

THE COURT: I have already found an overriding interest.

MR. BAINE: I wanted to clarify that, and I appreciate your saying that.

It is our position that the finding of an overriding interest should be made with respect to particular jurors who object.

THE COURT: And I have also indicated that I intend to make a specific finding

as to any juror who objects to particular questions when interrogated individually.

MR. BAINE: I just want to state for the record that we do not regard political affiliations, for example, as a matter of sensitivity that must be shielded from the public.

THE COURT: I think maybe your client might disagree. There are first amendment rights, you know, with respect to political affiliation.

MR. BAINE: Yes, there are, but in the context of a criminal trial here, we would not regard that as an overriding interest.

THE COURT: I do not intend to join any First Amendment issues to this case. There are enough constitutional issues already in the case. And that's wholly collateral. You will have to make your own judgment about that.

MR. BAINE: Nor would we regard a

person's experience with crime as an overriding interest justifying closure, except in extraordinary circumstances: A person is a victim of a rape and feels particularly embarrassed about talking about that. That may be one thing. If a person is the victim of a robbery on the subway, that's another.

THE COURT: That's a distinction I don't choose to make, Mr. Baine.

MR. BAINE: I think, with respect, it's a distinction that Press Enterprise requires the court to make.

THE COURT: I disagree. I do not read Press Enterprise that way.

MR. BAINE: Press Enterprise certainly says that only in extraordinary circumstances would a juror's right to privacy justify closure.

THE COURT: I've read Press Enterprise, and as I indicated to Mr. Dyk, you know where to seek succor.

MR. BAINE: Yes, Your Honor.

Finally, two points. The concern, to some extent, I recognize is a concern over encouraging jurors to be fully candid in responding to questions.

THE COURT: Correct.

MR. BAINE: That is a legitimate concern. It is, I think, a concern that is slightly different from the legitimate privacy concerns which may justify closure in extraordinary circumstances.

I think there is always a concern about encouraging jurors to be candid, but I think that the court can insure candor without conducting proceedings in chambers. So I don't regard the general interest in encouraging candor on the part of jurors to be sufficient to warrant closure.

Finally, I would like to say that if, indeed, the court finds in a given case that there is no compelling reason to

maintain a transcript under seal, or maintain a juror's questionnaire under seal, then, by the same token, I don't think there is any compelling justification to conduct proceeding in chambers.

A transcript is not sufficient for a number of reasons. There is a matter of delay. There is a matter of expense. The Washington Post and the New York Times may be able to afford the transcript, but members of the public won't be able to come and buy a transcript. They should be allowed to watch.

Of course, there are always things like demeanor and tone of voice that don't show up on a transcript. And I would simply like to say that if the court is prepared, as apparently the court was after yesterday's proceedings, to release the transcripts of these interviews and questions, that I think it should be

conducted in public.

Yesterday, I think you faced a difficult question, and I respectfully suggest that perhaps after yesterday's experience with individual jurors, we now know that very few of them, in fact, would object, and even those who do object may not have a very compelling reason to object.

Thank you, Your Honor.

THE COURT: There is a difference between objecting to release of one's transcript or one's questionnaire and objecting to being interrogated in open court on the witness stand.

MR. BAINE: In some circumstances, that may be, Your Honor. With respect to most of the subjects that are at issue here, I would respectfully disagree and suggest that candor can be insured through other means.

THE COURT: All right.

MR. BAINE: Thank you very much.

MISS BANG-JENSEN: Good morning, Your Honor. I'm Nina Bang-Jensen on behalf of the Associated Press. And I, too, don't want to repeat what Mr. Baine and Mr. Dyk have already said, but I would like to endorse the suggestion that Mr. Baine made that individual jurors be questioned in open court on all questions that are deemed not sensitive.

I think there is a procedural way to handle that. They simply are asked in open court whether there are sensitive questions, and at a side bar with your Honor, they indicate which ones they feel they need privacy.

With that, I have no further comments.

THE COURT: It's very difficult to anticipate where a question will lead.

MISS BANG-JENSEN: I think they are in the best position to determine whether

something is sensitive.

The Supreme Court in Press Enterprise clearly states that the burden is on the juror to make the affirmative request.

THE COURT: I intend to let the jurors make the request.

MISS BANG-JENSEN: And evaluate each separately.

THE COURT: All right.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	Cr. No. 87-0096
v.	
MICHAEL K. DEAVER.	

TRANSCRIPT OF PROCEEDINGS,
JULY 14, 1987, pp. 182-184

(The prospective jurors were brought into the courtroom).

THE COURT: Ladies and Gentlemen, I have been asked by the news media to conduct as much of this process of voir dire as can possibly be done consistent with your privacy interest in public in open court. And I intend to accede to that request to as great an extent as possible.

I am aware that, for a number of you, that the answers you have given to those questionnaires are sensitive and personal information and you might not desire

either to have that information revealed here in open court nor to answer any further questions that counsel might want to put to you in connection with the answers that you have given.

I am going to leave it largely to your discretion as to whether or not you are willing to be interrogated here in open court as to your questionnaires or whether you would prefer to have further questions put to you in the jury room, on the record, of course, and with counsel present, but, nevertheless, in the jury room.

Those of you who are willing to take the witness stand and answer further questions bearing upon your questionnaires in open court may be excused now to return to the jury lounge. If you will simply leave your name and number with the Marshal, we will send for you when we are ready to have you.

Those of you who would prefer to give your follow-up answers having to do with your questionnaires in the jury room remain seated and as soon as the others have been excused, we will proceed to take you into the jury room.

THE DEPUTY MARSHAL: Your Honor, they would like you to repeat what you just said.

THE COURT: All right. I will repeat it.

I realize that some of the information contained on the questionnaire is sensitive, personal, private information, and that you might not desire to either reveal that information here in open court, although you have had to reveal it and may have to reveal more, or that you prefer not to answer any questions pertaining to the answers that you have given on those questionnaires.

I am going to leave it largely to

your own discretion. Those of you who are willing to be interrogated here in open court on the answers that you have given to the questions on the questionnaire from the witness stand and respond to questions from me and from the lawyers about that information are excused to return to the jury lounge. We will then send for you as we reach you in the progression through the questionnaires.

Those of you, however, who would prefer to give your answers to the follow-up questions in the jury room in the presence of me, counsel and the court reporter, will be permitted to do so. And we will proceed to that first and then take the jurors who are willing to be interrogated in open court after we conclude those who are going to respond to questions in the jury room. And those of you who are willing to be interrogated in open court may simply leave your name and

number with the Marshal and then proceed to the jury lounge until we send for you.

(Five jurors leaving the courtroom).

THE COURT: I take it that those of you who remain are desirous of giving your further answers to the questions on your questionnaire in the jury room. And we will now adjourn these proceedings to the jury room.

(In the jury room).

THE COURT: Madam Reporter, you can let the record reflect the following jurors have expressed a willingness to be interrogated in open court: Juror 515, Carolyn Johnson; Juror 507, Frances Ingram; Juror 520, Beatrice Jones; Juror 501, Dawn Holly; and Juror 464, Doris Flanigan.

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	Cr. No. 87-0096
v.	
MICHAEL K. DEAVER.	

TRANSCRIPT OF PROCEEDINGS,
JULY 14, 1987, pp. 263-276

(After recess -- 12:45 p.m.)

(In open court):

THE CLERK: This court is now in session, be seated and come to order.

THE COURT: We are once more back in the courtroom to allow officers of the court who represent clients of the media to express themselves with respect to the procedure which has been followed in determining how much of the voir dire is to be conducted in open court and how much to be conducted in the jury room and under what conditions.

Mr. Dyk, you wish to be heard first?

MR. DYK: Thank you, your Honor.

As we indicated in chambers, we respectfully request that the procedure that was followed this morning be changed because we think it is not consistent with the Press Enterprise and Globe and the other Supreme Court decisions in this area. Our view is that the procedure is inconsistent with that line of cases in two respects:

First, by asking the jurors who want to be questioned publicly to excuse themselves from the courtroom, the burden is being put on those jurors who don't object to making an affirmative request to be questioned in public, whereas the burden ought to be the other way around. It is the jurors who wish to be questioned in private who ought to make the affirmative request.

And the second objection that we have, your Honor, is to the fact that it

is left to the discretion of the juror to decide that his or her interest would be served by private questioning. We respectfully suggest that under Press Enterprise and other cases the Court should make an individualized determination with respect to these jurors as to whether privacy interests are sufficiently sensitive that the juror should be questioned in private as opposed to open court, and the case suggests a strong presumption in favor of questioning in open court.

We suggested to your Honor one way that might be done, which would be to distribute a questionnaire to jurors asking them to check a questionnaire if they wish to be questioned in private and briefly state the reason why so that could be reviewed by your Honor and a determination could be made in each individual case as to whether the request

was based on a sufficient reason.

So those were the two objections, and I would raise one other thing which I did not mention in chambers and that is my understanding that during the process by which the jurors are sitting here in the courtroom and being called individually to go into the jury room for questioning, that it is now my understanding that the press is not permitted to be in the courtroom during that time and we respectfully request that the reporters be permitted to be in here during that process of calling the jurors out to the jury room.

THE COURT: Why would they want to be here? There is to be absolutely no contact between the press and the juror.

MR. DYK: I understand that. They want to observe the proceeding and observe what is going on. I can't speak for them as to what exactly they would write about

or say about that, but it is part of the open proceeding and we think that the reporters ought to be able to be there.

THE COURT: Should they be allowed to converse?

MR. DYK: With the jurors?

THE COURT: No, with one another.

MR. DYK: No, your Honor.

THE COURT: They will just sit here in silence in the courtroom; is that correct?

MR. DYK: That is what we are asking for. I can't control them. I would hope that they would remain quiet as reporters and people in the courtroom are always supposed to.

THE COURT: I have no objection to the[ir] simply sitting here mute if they wish to sit in the courtroom but they are not to converse.

MR. DYK: Thank you, your Honor. Thank you.

THE COURT: Mr. Baine?

MR. BAINE: Your Honor, I will be briefer than Mr. Dyk because this has been discussed fully in chambers and I won't take the Court's time.

I do wish to reiterate, however, one request that I made in chambers and that is that when the next subpanel of prospective jurors comes into court, that the Court at that time reverse the question that the Court put to the last subgroup and namely ask anyone in that panel who wishes to discuss these matters in private because in their view they are intensely personal, that those people identify themselves to the Marshal, rather than those who are willing to do it publicly identify themselves.

I think there is a substantial difference both in terms of the pressure on the particular person that is felt and also the Supreme Court has I think made it

clear that the juror must be required to make an affirmative request for privacy in order to minimize the risk of unnecessary closure and to ensure or at least to increase their likelihood that there really is a substantial reason. On the point that I think your Honor will be required to make the appropriate findings, I would request that when the next group comes in that the Court put the question the other way. Otherwise, I join in everything that Mr. Dyk said.

Thank you.

THE COURT: Ms. Bang-Jensen?

MS. BANG-JENSEN: Your Honor, I, too, on behalf of the Associated Press, join in everything that Mr. Baine and Mr. Dyk have said. I just wanted to make sure that the discretion as to whether a matter that is private and will not be discussed in open courtroom is a matter of discretion that is left with the Court as Press

Enterprises requires and not a matter of discretion solely in the hands of the jurors, respective jurors.

THE COURT: All right. Thank you. Mr. Seymour.

MR. SEYMOUR: Your Honor, this obviously is not an easy question to deal with because you are balancing two considerations but I would like to say a word for the other consideration which is the voir dire process and why we do it. The purpose of questioning jurors is to try to elicit prejudices or deep seeded convictions that might if he can their ability to be fair in the jury box, fair to both sides. We have seen already today examples of the kinds of problems that we need to ask questions about.

I remember one juror who mentioned an experience of a warrant[less] [search] of the house which the family resented. Now that isn't going to help my side of the

case. I need to know that. I remember another juror who felt very deeply that his brother had been wrongfully convicted of a felony and was serving time right now unjustly. That is a kind of element that bears directly on a fairness of a jury and it is just the kind of a subject that one ordinarily would not expect a person to want to proclaim to the world.

Now, the problem with the procedure that has been suggested is that you are putting people through a double test. First of all they have to stand up and say your Honor, I have something that I am embarrassed about, and therefore I don't want to be examined in the public courtroom , and then secondly, having failed to do that they are then examined in the public courtroom, and we will not get candid answers. That is my concern. There is a familiar doctrine in this first amendment area of a chilling effect. I

can't conceive of a more chilling effect than for your Honor to say to the jurors anybody who does not want to reveal to the world at large personal matters may now stand up and the fact is they are going to stay seated and I don't think it is fair to them and it is particularly harmful to the process.

THE COURT: Thank you. Mr. Miller?

MR. MILLER: If I may, your Honor, the press has its constitutional right, my client has his constitutional right. I don't need to tell this court or the press that that is a constitutional right to a fair trial. And from what I have seen of the proceedings and the way they are being conducted here, because of the sensitivity of the matters involved, it is only by the process that the Court is following that we will be able to get honest, candid responses so that not only Mr. Seymour but my client will be entitled -- will have a

jury which can render a fair verdict. And I subscribe to the procedures followed because I think it is in furtherance of the right of my client to a fair trial.

THE COURT: Thank you, Mr. Miller. The request that I modify the procedure by which this voir dire is being conducted will be denied. I intend once again with all successive panels to place the onus, if you will, on those jurors who will be willing to, in public, to depart the courtroom and let those who truly wish to remain silent and private about matters that they wish to remain private to stand mute.

It is not possible for me to exercise discretion in any objective fashion as to what is or is not to be private. Things are private simply because they are private to people. Not on any objective standard. What is sensitive, personal information for each of these respective

jury members is a matter which is entirely within their own hearts. They have to decide what is personal, what they do not want to reveal and what they are willing to reveal but do not want to stand up and proclaim in open court, and I have to trust to their judgment in deciding whether or not they can, consistent with their own wishes to remain private people, reveal the information that they are being asked to reveal.

In all other respects I think the suggestions that have been made are simply matters which are entrusted to my discretion whether I use a questionnaire or put a question orally to the panel seems to me to be immaterial. And I do not wish to place a burden on anyone to have to articulate in writing his reasons for being desirous of not proclaiming matters which are of importance to him in public.

In short, I am not going to alter the procedure that I have followed and I am reinforced in my conviction that the procedure is a proper one which fairly balances the interest involved here by the fact that both parties, prosecution and defense, here seem to feel that a fair trial is most likely to result by the procedures that I have adopted, and so for the representatives of the press who are requesting relief here so that they may proceed to another forum, you can treat your request as denied.

Mr. Seymour?

MR. SEYMOUR: Your Honor, in view of the fact the record is being made for that purpose, I think it would be helpful to any reviewing court for you or one of us to spell out the procedure that has been established to make the copy available each day as to what is transpiring in the robing room so there is no doubt --

THE COURT: All right. I will try to state what the procedure is at this time in some summary fashion so they won't have to reconstruct the process from several different portions of the transcript.

In essence what is being done is that the jurors are being interrogated in two separate panels, now that the initial questioning is over the individual questioning is taking place in two different panels, the jurors having completed questionnaires containing some nearly 40 questions, many of which deal with matters which are sensitive, personal, private information.

The questionnaires are being made available to counsel and to me and have not yet been made generally part of the public record although they are, as individual jurors are questioned and the jurors acknowledge that the questionnaires may be made part of the public record are

being filed as part of the record, in the case at the conclusion of the day along with the transcript of proceedings.

The only matters which are being expurgated are those which I have made specific findings that the jurors, respective jurors, are entitled to keep private altogether. And those portions appear prominently in the record. Each of the panels is being asked after having been told that the press has asked for maximum access to the proceedings to elect between submission to supplemental questioning in open court from the witness stand or in the jury room.

Those panel members who are willing, having been told that the press desires maximum access to the record, those who are willing to submit to interrogation, further interrogation about the matters contained in their questionnaires in open court are being excused to proceed to the

jury lounge where they will be summoned one by one as we reach them in the order of interrogation are -- or that is not correct, they will be reached at the conclusion of the interrogation of those jurors who manifest their desire to submit to further interrogation in the jury room by remaining seated when they are given the opportunity.

In short, the questionnaires and the transcript of proceedings in the jury room is being made available at the conclusion of each day subject only to such deletions as I have made affirmative findings with respect to at the request, specific request of jurors. And the questionnaires themselves under similar circumstances are being made available.

Have I omitted anything which the parties think is material from the description of the proceeding, inarticulate though it may have been --

inarticulately?

MR. SEYMOUR: The only thing I think might be worth commenting on is at least from my observation a very miniscule portion of the total record has been sealed at the request of the jurors. Indeed I doubt if it amounts to 1 percent of the --

THE COURT: I think that's correct. Do any of the press representatives wish to supplement what I have stated to be the procedure that I am following in any particular -- anything in particular you think I have left out a material part?

MR. DYK: No, your Honor, but I would like to address it in a somewhat different point if that is permissible.

THE COURT: That is what we are here for, Mr. Dyk.

MR. DYK: Your Honor, as I indicated in chambers, my clients, CNN, CBS, NBC and Capital Cities, would like to appeal your

Honor's ruling and for that purpose I would make two requests, one that if it can be done without interfering with the voir dire that the reporter be asked to transcribe the record so we can bring that up to the Court of Appeals.

THE COURT: I will ask her to do that provided there will be a reporter available at 2:00 for the resumption of voir dire.

MR. DYK: Is the jacket for the case, your Honor, in the clerk's office or is it here? If it is here can we take that up to the court, please?

THE COURT: I don't know where it is. We have it here. I don't immediately think we are going to need the jacket for any proceedings this afternoon. I would ask that it be returned as promptly as you can get it back here.

MR. DYK: I will tell that to Mr. -- thank you. Thank you again for listening

to us. We appreciate that.

THE COURT: All right. Stand in recess until 2:00.

APPENDIX J

U.S. v. Deaver, Cr. No. 87-096

JUROR QUESTIONNAIRE

The purpose of this questionnaire is to assist the Court and attorneys in the jury selection process. Please answer all of the questions to the best of your ability. Remember that you are under oath.

Juror No. _____.

1. Full name: _____.

2. Place and date of birth: _____.

3. Present Address: _____

_____

_____

4. How long have you lived at the above address? _____

5. How long have you lived in the District of Columbia? _____

6. Are you a registered voter? _____ If so, where are you registered? _____. How are you registered? ([i.e.,] Democrat, Republican, Independent, or other) _____.

Did you vote in 1980? _____. 1984? ____.

Other than as a voter, are you active politically? _____. If "yes", please explain briefly.

7. Have you, or has any relative or close friend, ever held an elected or appointed office in state, federal, or local government? _____. If "yes," please explain briefly.

8. Are you presently married? _____ If "yes," what is the full name of your spouse? _____.

How long have you been married? _____.

9. If your spouse is employed or has been employed, who is (or was) his or her employer? _____.

What is (or was) the nature of his or her job? _____

_____.

10. If previously married, please state the full names of all former spouses.

_____.

_____.

_____.

11. If you have children, please state their full names and ages, and occupations (if working).

Child's Name	Age	Occupation
_____	___	_____.
_____	___	_____.
_____	___	_____.
_____	___	_____.
_____	___	_____.

12. What is (or was) your principal occupation? _____.

What is (or was) the nature of your work? _____.

List all places at which you have worked full-time for as long as three consecutive years.

_____.

_____.

_____.

_____.

_____.

Are you currently: employed _____.

unemployed _____.

retired _____.

13. How many years of formal education have you had? _____.

What was the last full-time school you attended? _____.

When did you last attend school? _____.

14. What TV or radio news program do you watch or listen to fairly regularly?

_____

_____

_____

15. What newspapers or news magazines do you read fairly regularly? _____

_____ _____

_____

16. Do you have chronic or major health problem[s]? _____. If "yes," please explain briefly.

17. Does any member of your household have any chronic or major health problem[s]? _____. If "yes," please explain briefly.

18. Have you, or has any relative or close friend, ever had a drinking problem or suffered from alcoholism? _____. If "yes," please explain briefly.

19. Do you hold any personal opinions about alcoholism? _____. If "yes," please explain briefly.

20. Have you, or has any relative or close friend, ever been addicted to any drug? _____. If "yes," please explain briefly.

21. Have you, or has any relative or close friend, ever been a victim of a crime? _____. Charged with a crime? __. A witness to a crime? _____. If any

answer is "yes," please explain briefly.

22. Have you, or has any relative or close friend, ever participated in a criminal or civil trial in any other capacity (e.g., party, lawyer, witness, juror, investigator, etc.)? _____. If "yes," please explain briefly.

23. Have you, or has any relative or close friend, ever trained or worked in the fields of law or law enforcement? _____. If "yes," please explain briefly.

24. Do you hold any personal opinions about persons engaged in the fields of law or law enforcement? _____. If "yes," please explain briefly.

25. Have you, or has any relative or close friend, ever trained or worked in the fields of public relations, public affairs consulting, political consulting, or lobbying? _____. If "yes," please explain briefly.

26. Do you hold any personal opinions about persons engaged in the fields of public relations, public affairs consulting, political consulting, or lobbying? _____. If "yes," please explain briefly.

27. Other than employment, past or present, or the relationships we all have in common with the government, do you, or

does any relative or close friend, have any special connection with the U.S. government? _____. If "yes," please explain briefly.

28. This case involves Michael Deaver, a former member of President Reagan's White House staff. Do you hold any personal opinions about the Reagan administration in general? _____. If "yes," please explain briefly.

29. Do you hold any personal opinions about politicians or high government officials in general? _____. If "yes," please explain briefly.

30. This case also involves relations between the United States government, two foreign countries (the Republic of [South] Korea and Canada), the Commonwealth of Puerto Rico, and several private corporations (Trans World Airways, Inc.; Smith Barney, Harris Upham & Co., Inc.; Philip Morris, Inc.; Rockwell International, Inc.; and the Boeing Corporation). Do you, or does any relative or close friend, have any connection of any kind with either of those two countries, the Commonwealth of Puerto Rico, or any of those corporations? _____. If "yes," please explain briefly.

31. As has been mentioned, this case, and certain events leading up to it, have

received considerable publicity, both before and after the indictment was filed. Are you aware of the publicity? _____. If "yes," please describe briefly what you remember about it.

32. Have you formed any personal opinions based upon the publicity? _____. If "yes," please explain briefly.

33. Specifically, have you formed any opinions whatsoever, based on information from any source, of Mr. Deaver's guilt or innocence of anything? _____. If "yes," please explain briefly.

34. This case involves charges of perjury and false declarations before a

congressional committee and a grand jury. Those crimes are, in substance, knowingly making untrue statements while under oath to tell the truth. Do you hold any personal opinions about crimes of that nature? _____. If "yes," please explain briefly.

35. The jury will be instructed not to read, watch, or listen to any news accounts of this trial whatsoever until it is over, and not to talk to anyone about the case, not even one to another, until it retires to deliberate upon its verdict. Would you find it difficult to follow such an instruction for any reason? _____. If "yes," please explain briefly.

36. The jury will be instructed that the defendant is presumed to be innocent

throughout the trial, and that he cannot be found guilty of any offense until the government has proved each element of that offense beyond a reasonable doubt. Would you find it difficult for any reason to follow that instruction? _____. If "yes," please explain briefly.

37. Is there anything, or any reason at all, however personal or private, that makes you feel that you should not serve as a juror on this case, or could not be a fair and impartial juror? _____. If "yes," please explain briefly.

I declare under penalty of perjury that the foregoing is true and correct.

_____

(Signature)

_____

(Date)

Supreme Court, U.S.
FILED
SEP. 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-331

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MICHAEL K. DEAVER,
Petitioner,
v.
CABLE NEWS NETWORK, INC., *et al.*,
Respondents.

BRIEF OF THE WASHINGTON POST COMPANY AND THE NEW YORK TIMES COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly applied this Court's decision in *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984), in holding that the privacy interests of prospective jurors in a criminal case could not justify excluding the public from their *voir dire* examination, when the trial court (1) failed to "requir[e] the prospective juror[s] to make an affirmative request" for *in camera voir dire*, *id.* at 512, (2) failed to make any findings concerning the privacy interests of individual prospective jurors, and (3) failed to consider alternatives that might minimize the degree of closure.

RULE 28.1 LISTING

The following are parents, subsidiaries (except wholly owned subsidiaries) or affiliates of respondent The Washington Post Company:

Bowater Mersey Paper Company, Limited
International Herald Tribune, S.A.
Los Angeles Times—Washington Post News Service, Inc.
Bear Island Paper Company
Washington/Baltimore Cellular Telephone Company
Sandoval County Cable Television Co.
Detroit Cellular Telephone Company

The following are parents, subsidiaries (except wholly owned subsidiaries) or affiliates of respondent The New York Times Company:

Donohue Malbaie, Inc.
Gaspesia Pulp and Paper Company, Ltd.
International Herald Tribune, S.A.
Northern SC Paper Corporation
Spruce Falls Power and Paper Company, Limited

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STATEMENT OF THE CASE

Petitioner asks this Court to review a unanimous, summary reversal of the district court's closure of the *voir dire* examination of individual prospective jurors in his trial for perjury. *United States* v. *Deaver*, No. 87-0096 (D.D.C.).

On July 13, 1987, the *voir dire* began with the district court's announcing to the prospective jurors that it would "do all that is possible in the circumstances to protect your privacy." Appendix to the Petition for a Writ of Certiorari ("Pet. App.") 25a. After some preliminary questioning, the court asked each member of the jury panel to fill out a questionnaire containing thirty-seven questions. The court told the prospective jurors that they would then be

brought individually into the jury room "where, in privacy, counsel and [the court] can ask you any further appropriate questions which your answer[s] on the questionnaire may suggest . . . ." Pet. App. 26a. The questionnaires themselves were to be sealed "at least until the conclusion of the case." *Ibid.*

The juror questionnaires included a number of questions that are routinely asked of prospective jurors, and additional questions relating more particularly to the nature of petitioner's case. See Pet. App. 83a. For example, the prospective jurors were asked for such routine background information as the length of their residence in the District of Columbia, their education, their marital status, their employment and the employment of their immediate family members, and any major health problems. They were also asked, as prospective jurors routinely are, whether they had ever participated in a criminal or civil trial in any capacity, whether they or any relative had ever worked in the field of law or law enforcement, whether they had any opinions about persons engaged in those fields, and whether they had ever been victims of crime or charged with a crime.

Because the defendant was a former member of President Reagan's White House staff, now engaged in public relations and political consulting, the prospective jurors were asked whether they had any personal opinions about politicians, high government officials, the Reagan administration, or persons engaged in the fields of public relations and political consulting. Presumably for similar reasons, the prospective jurors were asked to state their political affiliation and to indicate whether they were active

politically. They were also asked questions that are routinely asked in cases that have attracted some publicity—what newspapers or news magazines they read regularly, what TV or radio news programs they watch or listen to regularly, whether they had heard or read about the case and, if so, whether they had formed any opinions based upon the publicity. Presumably anticipating a potential defense in the case, the court also inquired whether the prospective jurors, or any of their relatives or close friends, had ever suffered from alcoholism or drug addiction.

After the prospective jurors had completed their questionnaires, counsel for The Washington Post Company called the court's attention to *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"). Thereafter, the court told the jury panel that because of "a recent decision of the Supreme Court," it could not keep the questionnaires sealed, unless it made specific findings with respect to individuals' responses. Pet. App. 31a. Nevertheless, the court continued with its plan to examine the prospective jurors on their questionnaires in private, releasing only a transcript of the questioning with any sensitive material redacted.

In conferences in chambers with the district judge, counsel for the Post and counsel for the television networks (CNN, ABC, CBS and NBC) objected to the closure of the proceedings. After the court had an opportunity to reflect overnight upon *Press-Enterprise I*, it announced the next morning that it would "allow the individual panel members to elect whether or not they wish[ed] further questioning having to do with their answers to the questions to be conducted in the jury room or in open court." Pet. App. 37a.

The Post and the television networks, joined by The New York Times Company and the Associated Press, objected on the record that the decision whether *voir dire* was to be conducted in private should not be left entirely to the prospective jurors. They argued that after an individual made a specific request for *in camera* questioning, the court was required to make a specific determination of an overriding interest supporting closure of that individual's *voir dire* examination. Pet. App. 47a-48a.

The court rejected that argument. It ruled instead that it would exclude the public from the examination of all potential jurors who preferred private questioning based upon its general finding that *all* such jurors had "a compelling interest" in the privacy of their responses to "many" questions on the questionnaire—"including but not limited to those questions relating to their political affiliation, their personal and familial experiences with crime and substance abuse and their medical histories." Pet. App. 37a.

Consequently, the court instructed the panel members as follows:

> I am aware that, for a number of you, that the answers you have given to those questionnaires are sensitive and personal information and you might not desire either to have that information revealed here in open court nor to answer any further questions that counsel might want to put to you in connection with the answers that you have given.
>
> *I am going to leave it largely to your discretion as to whether or not you are willing to be interrogated here in open court as to your question-*

> *naires or whether you would prefer to have further questions put to you in the jury room*, on the record, of course, and with counsel present, but, nevertheless, in the jury room.

Pet. App. 57a-58a (emphasis added). The court then stated that anyone who was willing to be questioned in open court should identify himself to the marshals and leave the court room, to be called back at a later time. Predictably, only five of approximately thirty potential jurors volunteered to leave the room and to be examined at a later time in open court. The remaining members of the panel said nothing, and were therefore to be examined in the jury room. Pet. App. 59a-61a.

Counsel for the press objected once again that the court's procedure was inconsistent with *Press-Enterprise I*, in that it left the question of closure entirely to the prospective jurors' discretion, and that it reversed this Court's requirement that a prospective juror make an "affirmative request" for private questioning by requiring instead that prospective jurors volunteer for public questioning. Pet. App. 64a-65a. The court overruled those objections, stating that it "intend[ed] . . . to place the onus" of coming forward on those members of the panel who were willing to be questioned in public. Pet. App. 73a.

The same day, the Post and the Times, and the television networks, filed separate emergency appeals and motions for summary reversal. The court of appeals immediately ordered the parties to show cause why the district court should not be summarily reversed. The following day, July 15, 1987, the panel heard argument, and unanimously reversed the district court in a *per curiam* opinion. The court held:

> The District Court's order fails to meet any of the three conditions articulated in *Press-Enterprise* for closure of *voir dire*.
>
> First, the District Court had no evidence in the record and made no findings that public interrogation of any individual member of the *voir dire* would "touch[] on deeply personal matters that [the juror] has legitimate reasons for keeping out of the public domain." *Press-Enterprise*, 464 U.S. at 511. . . .
>
> * * * *
>
> Second, the District Court did not, as *Press-Enterprise* demands, "requir[e] the prospective juror[s] to make an affirmative request" for an *in-camera voir dire* interview. *Id.* at 512. . . . The District Court, in our view, stood this requirement on its head by permitting prospective jurors to elect closed *voir dire* simply by remaining mute. . . .
>
> Third, the District Court acted apparently without considering alternatives that might minimize the degree of closure. *Cf. id.* at 513. By way of obvious example, the District Court could have conducted *voir dire* in open court, responding to individual expressions of specific concern over particular questions by permitting interrogation *in camera* where warranted under prevailing law.

Pet. App. 9a-13a.

The court of appeals directed the district court to conduct further *voir dire* proceedings in accordance with its opinion. It did not order, and the press representatives did not request, that the district court abort the proceedings and begin *voir dire* again.

Nevertheless, the district judge decided to dismiss the jury panel and to begin the proceedings at a later date with a new panel.

The court of appeals subsequently denied petitions for panel rehearing and for rehearing *en banc*. Pet. App. 21a.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Correctly Applied This Court's Decision in *Press-Enterprise I*

The court of appeals' opinion did not rest upon any novel or controversial ruling of law, nor did it break new ground or expand existing precedent. Rather, as petitioner notes, it "was based completely on the strict standards for closure of *voir dire* proceedings established by this Court in *Press-Enterprise I*." Pet. 25-26. And as the court of appeals noted, the correct application of those standards to this case was "so clear that summary reversal [was] appropriate." Pet. App. 8a.

In *Press-Enterprise I* this Court reversed the partial closure of *voir dire* in a highly-publicized rape trial. The trial court had decided, in order to protect jurors' privacy and encourage the candor necessary to a fair trial, that it would hold *voir dire* in two stages. The public would be permitted to attend the "general *voir dire*," but would be excluded from individual questioning, and the transcript of the individual questioning would be sealed. 464 U.S. at 503-04. Upon challenge by the press, this Court found that the closure of the *voir dire* and the suppression of the transcript violated the constitutional right to public proceedings in criminal trials. The Court held

that *voir dire* is a part of the criminal trial to which a presumption of openness attaches, and that the "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." 464 U.S. at 510.

When, as in the *Press-Enterprise* case and in this case, closure is sought to protect juror privacy, the Court established three requirements: First, to "minimize the risk of unnecessary closure," the court must require a prospective juror to make an "affirmative request" to be questioned in private. *Id.* at 512. Second, the court must make specific findings on the record that questioning the juror in open court would threaten his legitimate privacy interest. *Id.* at 510. Finally, the court must consider whether alternatives less drastic than closure are available. *Id.* at 511.

The district court in this case did not comply with any of those requirements. It did not require prospective jurors to make any "affirmative request" to be questioned privately. Indeed, in the words of the court of appeals, the court "stood this requirement on its head by permitting prospective jurors to elect closed *voir dire* simply by remaining mute." Pet. App. 13a.

Nor did the district court have any evidence, or make any findings, with respect to the privacy interests of any particular prospective jurors. The court supported its closure order only with a blanket finding with respect to all prospective jurors, noting that "there [was] a high probability that as to each juror there [would be] at least one question which

he or she would prefer not to have to utter in open court from the witness stand." Pet. App. 41a-42a. The court explained that it was not required to rule on the legitimacy of individual jurors' claims, because the court "d[id] not read *Press-Enterprise* that way," Pet. App. 50a, and because such individualized determinations were impossible anyway:

> It is not possible for me to exercise discretion in any objective fashion as to what is or is not to be private . . . . What is sensitive, personal information for each of these respective jury members is a matter which is entirely within their own hearts. They have to decide what is personal, what they do not want to reveal and what they are willing to reveal but do not want to stand up and proclaim in open court, and I have to trust to their judgment . . . .

Pet. App. 73a-74a.

Finally, as the court of appeals noted, the district court did not consider "alternatives that might minimize the degree of closure," such as limiting *in camera* questioning to those areas in which specific privacy concerns might warrant closure. Pet. App. 13a. The district court noted simply that there would probably be "at least one question" which each juror would rather not have to answer in open court. Prospective jurors, however, were to be questioned in private on *all* areas embraced by the questionnaires —including, for example, the length of their residence in the District of Columbia, their education, their occupation, their marital status, their reading habits, and their opinions about law enforcement officials, politicians and those engaged in public relations. See Pet. App. 42a-44a.

Petitioner argues that the threefold requirements of *Press-Enterprise I* do not apply to this case because a transcript of the *voir dire* proceedings was made available in this case, whereas *Press-Enterprise I* "involved the complete closure of *voir dire* for six months and the total denial of media access to *any* information about those proceedings." Pet. 26.

Petitioner, however, misstates the facts of *Press-Enterprise I*—the *voir dire* was closed for six weeks, not six months, and the public was permitted to attend its initial stages. 464 U.S. at 503. More imporantly, petitioner misconceives the holding in *Press-Enterprise I*. This Court did not merely articulate the standards required to justify sealing a *voir dire* transcript; it spoke of the right to "open public proceedings in criminal trials," 464 U.S. at 503, and set standards for closing *voir dire* proceedings. Petitioner cites the Court's statement that "[w]hen limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time." 464 U.S. at 512. But that statement does not suggest that closure may be ordered without requiring an affirmative request by a prospective juror, without making any particularized finding as to an overriding privacy interest, and without considering less drastic alternatives. In fact, in the immediately preceding sentences, the Court emphasized that the requirement of an affirmative request for *in camera* examination was intended to "minimize the risk of unnecessary closure." *Id.* at 512. The Court even suggested that excusing an individual panel member

from jury service may be preferable to partial closure. *Ibid.*

In short, this Court did not hold that the mere provision of a *voir dire* transcript is a substitute for holding *voir dire* in open court. Rather, the Court held that when findings have been made to support closure, the Court should then consider whether the transcript can be made available at a later time to minimize the injury to the public. In this case, the district court failed altogether to make the findings required to justify closure in the first place.

This Court's earlier decision in *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982), also rejected any notion that provision of a transcript is an adequate substitute for allowing the public to attend criminal proceedings. In that case, the court invalidated a statute excluding the public from the courtroom during the testimony of minor victims of sex offenses—testimony far more likely to implicate substantial privacy concerns than the *voir dire* examination in this case—even though, as the court noted, the public was "not denied access to the transcript." *Id.* at 610.[1]

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[1] "[T]he availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the 'cold' record is a very imperfect reproduction of events that transpire in the court room." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 597 n.22 (1980) (Brennan, J., concurring in the judgment); *see also Publicker Industries, Inc.* v. *Cohen*, 733 F.2d 1059, 1072 (3rd Cir. 1984) ("a district court in deciding whether to conduct a proceeding *in-camera* must not relax the standard necessary to close a proceeding simply because a transcript of that closed proceeding can be made available at a later date").

Petitioner complains that the court of appeals' opinion "reads . . . the defendant's constitutional right to trial by a fair and impartial jury . . . out of the caselaw." Pet. 25. The result of the court's decision, he contends, is that "a criminal defendant now has a constitutional right to select a fair and impartial jury only to the extent that such selection process does not infringe in any way on the media's right to be present at the time." Pet. 22. The court of appeals, however, said no such thing, and it is a gross distortion of the court's opinion to suggest that it reads the right to a fair trial out of the law. The court of appeals made clear, as this Court did in *Press-Enterprise I*, that *voir dire* may be closed if the trial court "make[s] findings that an open *voir dire* proceeding threatens either the defendant's Sixth Amendment right to a fair trial or a prospective juror's privacy interests." Pet. App. 7a. In addition, of course, the court must consider available alternatives to closure and, to the extent juror privacy is involved, must require prospective jurors to make an "affirmative request" for private examination. Pet. App. 7a-8a.[2]

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[2] Since the petitioner criticizes the court of appeals for giving inadequate attention to the defendant's right to a fair trial, it should be noted that the district court's closure of the *voir dire* examination was based almost exclusively on the jurors' purported privacy interests, not the defendant's interest in a fair trial. The court repeatedly invoked the general privacy interests of prospective jurors to support closure. See Pet. App. 26a, 32a-33a, 37a-38a, 41a-45a, 48a-49a, 57a-61a. The only finding that the district court made was that "many questions on the jurors' questionnaire . . . give rise to a *compelling interest of the prospective jurors* in keeping

In this case, the court of appeals concluded simply that the district failed to follow the procedures and make the findings required for closure. There is nothing about that conclusion that warrants review by this Court.

II. There Is No Split among the Circuits

Petitioner argues that there is a "clear" and "direct" conflict among the circuits. Pet. 28. But he does not specify the precise issue on which the circuits are said to be split. Petitioner appears to argue that the public's interest in access to *voir dire* proceedings is satisfied fully if the press is given access to the transcripts and juror questionnaires. When that occurs, petitioner argues, "the Fourth and Fifth Circuit have held . . . the media [is] entitled to no more." Pet. 34. Those circuits do not—and under *Press-Enterprise I* could not—so hold. The cases

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their answers . . . out of the public domain." Pet. App 37a (emphasis added).

Although the court made passing reference to its desire to ensure "a fair trial and the privacy rights of these jurors," Pet. App. 38a; see also Pet. App. 75a, it made no specific findings with respect to any threat to the defendant's right to a fair trial. As this Court has emphasized, "[i]f the interest asserted is the right of the accused to a fair trial, the [proceedings] shall be closed only if *specific* findings are made demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's free trial rights." *Press-Enterprise Co.* v. *Superior Court of California*, 106 S. Ct. 2735, 2743 (1986) (*Press-Enterprise II*) (emphasis added).

cited, to the extent they are relevant at all, are consistent with the present case.

In *United States* v. *Edwards*, 823 F.2d 111 (5th Cir. 1987), the court held that no presumption of openness attached to mid-trial proceedings inquiring into possible juror misconduct—proceedings which the court noted "have traditionally been closed to the public." *Id.* at 116-17. In so holding, the *Edwards* court specifically distinguished mid-trial interviews from *voir dire* proceedings of the sort at issue in this case. *Id.* at 117.

Petitioner relies upon that portion of the *Edwards* opinion holding that there is "a limited right of access to the record of closed [mid-trial] proceedings concerning potential jury misconduct and . . . a presumption that the transcript of such proceedings will be released within a reasonable time." *Id.* at 118. Contrary to petitioner's apparent contention, however, the court did not hold that providing a transcript fully satisfied the right of access to proceedings, such as jury *voir dire*, that are themselves presumptively open. The provision of a transcript in *Edwards* was considered an adequate substitute for attendance at a proceeding to which the court held "no presumption of openness attaches." *Id.* at 117.

Nor does the law of the Fourth Circuit conflict with the court of appeals' decision in this case. The Fourth Circuit has explicitly "adopt[ed] . . . as prerequisites to a closure order in a criminal proceeding" the requirements that the court give the public prior notice and opportunity to be heard, that the court state its reasons for closure "on the record, supported by specific findings," and that the court

"also state its reasons on the record for rejecting alternatives to closure." *In re Knight Publishing Co.*, 743 F.2d 231, 234-35 (4th Cir. 1984) (citation omitted). *See also In re Washington Post Co.*, 807 F.2d 383, 392 (4th Cir. 1986) (applying *Knight Publishing* to reverse a closure order based on national security for failure to make requisite findings).

Petitioner claims a conflict with the Fourth Circuit's earlier decision *In re Greensboro News Co.*, 727 F.2d 1320 (4th Cir.), *cert. denied*, 469 U.S. 829 (1984). That case was decided initially the day before *Press-Enterprise I*, see 727 F.2d at 1327, and was not relied upon in the Fourth Circuit's subsequent decision *In re Knight*.[3] Even assuming its vitality as a precedent, it does not conflict with the court of appeals' application of *Press-Enterprise I* in this case.

In *Greensboro News*, the court of appeals approved the exclusion of the public from *voir dire* examination of potential jurors for reasons entirely different from those that prompted the district court to close *voir dire* in this case. The principal concern in *Greensboro News* was not juror privacy, but rather the threat to a fair trial that would result if potential jurors' answers to *voir dire* questions about pretrial

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[3] The Fourth Circuit has cited *Greensboro News* only twice—once for the proposition that a riot "generated a substantial amount of media attention," *In re Russell*, 726 F.2d 1007, 1008 (4th Cir. 1984), and once for the historical proposition that that court had "independently arrived at the same conclusion with respect to *voir dire* [as *Press-Enterprise I*] at approximately the same time." *In re Washington Post Co.*, 807 F.2d at 388 n.5.

publicity became known to other prospective jurors. See 727 F.2d at 1328. All parties agreed in that case that the examination of each individual prospective juror on the question of pretrial publicity had to be conducted outside the presence of other potential jurors. *Id.* at 1321. Because of what it felt to be the "nearly unique" and "extraordinary nature of the case," *id.* at 1322 n.4, 1328 n.4, the trial court believed that exclusion of the public was necessary to prevent prospective jurors from learning about the responses of others. *Id.* at 1323, 1325. The court also noted that the case involved highly publicized allegations that members of the Ku Klux Klan and the National Socialist Party of America had conspired to shoot participants in an anti-Klan parade, and that potential jurors who believed those organizations are prone to violence might be reluctant to express their opinions in open proceedings because of the fear of retribution. *Id.* at 1325.

Regardless of whether the court's decision to close the *voir dire* proceedings was correct in the circumstances of the *Greensboro News* case, that court's decision certainly does not conflict with the court of appeals' decision in this case. The court in *Greensboro News* explicitly required findings of a substantial probability that (1) irreparable damage to the defendant's fair trial right would result from public *voir dire* proceedings, (2) alternatives to closure would not adequately protect the defendant's right to a fair trial, and (3) closure would be effective in protecting against the perceived harm. *Id.* at 1325. Those standards, articulated the day before *Press-Enterprise I* was decided, closely parallel the stand-

ards contained in *Press-Enterprise I* and applied by the court below.[4]

The court of appeals' decision in this case is also consistent with the decision of the Seventh Circuit in *United States* v. *Peters*, 754 F.2d 753 (1985). In that case, the court of appeals applied *Press-Enterprise I* to reverse an order excluding the public from *voir dire* proceedings, even though a transcript was made available at court expense after the *voir dire* was concluded.

In sum, there is no conflict among the circuits on the appropriate standards for excluding the public from *voir dire* proceedings.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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[4] After this Court issued its decision in *Press-Enterprise I*, the *Greensboro News* court issued a supplemental opinion noting that it "did not . . . regard *Press-Enterprise Co.* as particularly close or relevant to the *Greensboro News Co.* case." 727 F.2d at 1327-28.

Supreme Court, U.S.
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No. 87-331

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MICHAEL K. DEAVER,
Petitioner,
v.
CABLE NEWS NETWORK, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS CABLE NEWS NETWORK, INC., CAPITAL CITIES/ABC, INC., CBS INC., AND NATIONAL BROADCASTING COMPANY, INC.

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that the closure of *voir dire* to the press and public in the circumstances of this case violated the First Amendment as interpreted by this Court in *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984).

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties to the proceeding in the court of appeals were:

Michael K. Deaver
(Petitioner)

The United States of America

The Washington Post Company
The New York Times Company
(Respondents not participating in this brief)

Cable News Network, Inc.
Capital Cities/ABC, Inc.
CBS Inc.
National Broadcasting Company, Inc.
(Respondents participating in this brief)[1]

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[1] The following is a list of all publicly-owned parents, subsidiaries and affiliates of Cable News Network, Inc.; Capital Cities/ABC Inc.; CBS Inc.; and National Broadcasting Company, Inc., that, to the knowledge of counsel, have any outstanding securities in the hands of the public. In light of the purposes of Supreme Court Rule 28.1, we construe the terms "parent companies," "subsidiaries," and "affiliates" to mean those corporations (1) whose shares are publicly traded; (2) in the case of "parent companies," which own a majority of the shares of a party; and (3) in the case of "subsidiaries and affiliates," a majority of whose shares are owned by a party or a parent of a party.

1. *Cable News Network, Inc.*—Cable News Network, Inc. is the wholly-owned subsidiary of Turner Broadcasting System, Inc.

2. *Capital Cities/ABC, Inc.*—Capital Cities/ABC, Inc. has no parent companies, subsidiaries or affiliates so defined.

3. *CBS Inc.*—CBS Inc. has no parent companies, subsidiaries or affiliates so defined.

4. *National Broadcasting Company, Inc.*—National Broadcasting Company, Inc., is a wholly-owned subsidiary of General Electric Company, a publicly-owned corporation. The following subsidiaries of General Electric Company have securities that are publicly owned: General Electric Credit Corporation, Canadian General Electric Company, Ltd., General Electric Overseas Capital Corporation, and RCA Corporation.

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BRIEF IN OPPOSITION OF RESPONDENTS CABLE NEWS NETWORK, INC., CAPITAL CITIES/ABC, INC., CBS INC., AND NATIONAL BROADCASTING COMPANY, INC.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the First Amendment to the Constitution of the United States, which provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

STATEMENT

On March 18, 1987, petitioner Michael K. Deaver was indicted by a federal grand jury on perjury charges. *Voir dire* examination of prospective jurors was set to begin on Monday, July 13, 1987. As part of the *voir dire*, the prospective jurors were to complete a questionnaire that consisted of 37 questions, ranging from questions that did not implicate any privacy concerns (*e.g.*, "Have you, or has any relative or close friend, ever held an elected or appointed office in state, federal, or local government?") to questions which may have raised privacy concerns for some people (*e.g.*, "Have you, or has any relative or close friend, ever been addicted to any drug?"). (Petitioner's Appendix J, at 83a-96a).

On Friday, July 10, 1987, the district court *sua sponte* ordered that the individual *voir dire* questioning of prospective jurors be conducted in chambers or in the jury room. (*See* Appendix A to this brief, at 1a.) The court further ordered that the transcripts of those proceedings and the prospective jurors' completed questionnaires not be released except by order of the court after the completion of the trial. (*Id.*)

On July 13, 1987, jury selection began. On that date, at the request of one of the respondents, the court modified its order of July 10 to allow the questionnaires and the transcript to be publicly released at the close of the day's proceedings, except to the extent a particular juror objected. (Petitioner's Appendix F, at 29a-34a.) During the course of the first day's *voir dire* proceedings, only "a very miniscule portion of the total record [was] sealed at the request of the jurors," estimated to be less than "one percent" of the total record. (Petitioner's Appendix I, at 79a). The court, however, continued to close the individual jurors' *voir dire* to the press and public because it believed that some of the jurors might not wish to be examined publicly with respect to some of the matters covered in the questionnaire. (Petitioner's

Appendix F, at 29a-34a, Petitioner's Appendix G, at 37a.)

On Tuesday, July 14, 1987, at a hearing in open court commencing at 9:30 a.m., respondents objected to the closure, urged that it was inconsistent with the requirements of this Court's decision in *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984), and requested that the court conduct the *voir dire* proceedings in open court. In response, the court seemed to indicate that it intended to close the proceedings only as to a juror who raised objections and only as to that portion which the court determined to be sensitive and the juror believed to be sensitive. (Petitioner's Appendix G, at 41a.) In practice, the court followed a different approach.

At approximately 10:00 a.m., the court addressed *en masse* a panel of approximately thirty prospective jurors and informed them that it had "been asked by the news media" to conduct the *voir dire* in open court. (Petitioner's Appendix H, at 57a.) It stated that in response it was presenting the jurors with the choice between being examined privately or publicly (*id.* at 57a-61a), explaining to the panel members that it was leaving the matter "largely to your discretion." (*Id.* at 58a.) The court asked that those who wished to be examined privately express that preference by remaining seated and silent. Those who were willing to be examined publicly were asked to stand, give their names to the marshal, and proceed back to the jury lounge to wait until all the private examinations were completed. (*Id.*)

When the court had finished giving those instructions, the prospective jurors, through the marshal, asked the court to repeat them. (*Id.* at 59a.) Upon hearing the same instructions again, only five of the approximately thirty members of the panel gave their names to the marshal and left for the jury lounge. (*Id.* at 61a.) In

other words, twenty-five of the thirty panel members passively elected private examination, in contrast to the "miniscule" number that had voiced privacy concerns on the previous day. Of the five who chose public examination, one or more subsequently changed their minds and took advantage of the court's offer of private examination. (*See* Appendix B to this brief, at 3a.)

Respondents objected to the court's modified approach on the ground that it placed a burden on jurors to elect public examination and because the court left the matter to the jurors' discretion and did not individually assess the privacy interests of those jurors who passively opted for private examination. Respondents proposed less restrictive alternatives to the court's procedure.[1] The court rejected respondents' position:

> It is not possible for me to exercise discretion in any objective fashion as to what is or is not to be private . . . . What is sensitive, personal information for each of these respective jury members is a matter which is entirely within their own hearts. . . . *I have to trust to their judgment* in deciding whether or not they can, consistent with their own wishes to remain private people, reveal the information that they are being asked to reveal."

(Petitioner's Appendix I, at 73a-74a (emphasis added).) Because the court did not wish "to place a burden on anyone to have to articulate" reasons for choosing private rather than public examination, (Petitioner's Appendix I, at 74a) it asked no questions of any individual juror regarding privacy concerns and made no finding that any particular juror had a specific concern that merited private *voir dire*. The court indicated that it

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[1] For example, respondents suggested that the court could distribute to the jurors a questionnaire on which they could indicate if they had a preference for private questioning and, if so, what their reasons were, thereby allowing the court to assess those reasons. (Petitioner's Appendix I, at 65a; *see also id.* at 68a.)

would follow the same procedure throughout the *voir dire* process, stating that it intended "to place the onus, if you will, on those jurors who will be willing to, in public, to depart the courtroom and let those who truly wish to remain silent and private about matters that they wish to remain private to stand mute." (Peitioner's Appendix I, at 73a, 76a-78a.)

Respondents immediately appealed, seeking summary reversal on the ground that the court had failed to comply with the clear requirements of this Court's *Press-Enterprise* decision. That afternoon, the court of appeals issued an order directing petitioner and the United States to show cause, by 10:00 a.m. the following morning, why the district court's procedure should not be overturned. The next morning, July 15, 1987, a panel of the Court of Appeals for the District of Columbia Circuit (Judges Starr and Silberman and Senior Judge McGowan) heard oral argument. That afternoon, the court unanimously ruled that the merits of respondents' argument were "so clear that summary reversal is appropriate." (Petitioner's Appendix A, at 8a.)

The court held that the district court's procedure failed to meet the conditions for closure set out in this Court's decision in *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984), and ordered the district court to conduct further *voir dire* proceedings in open court except to the extent that a particular juror made an "affirmative request" for closure and the court made a specific finding that, with respect to that juror, there was "a valid basis for a belief that disclosure infringes a significant interest in privacy." (Petitioner's Appendix A, at 12a-13a (quoting *Press-Enterprise*, 464 U.S. at 512).)

On July 16, 1987, the district court, rather than continue with *voir dire* in accordance with the court of appeals decision, dismissed the entire panel and tentatively

rescheduled the proceedings to begin anew on October 19, 1987, in order to give petitioner the opportunity to seek certiorari.[2] (*See* Petition at 17 & n.3.) On August 11, 1987, the court of appeals panel that decided the case denied petitions for rehearing filed by petitioner and the United States. (Petitioner's Appendix C, at 19a.) On that same date, the court of appeals denied petitioner's and the United States' suggestions for rehearing *en banc*, with "no member of the Court request[ing] the taking of a vote thereon." (Petitioner's Appendix D, at 21a.) This petition followed.

ARGUMENT

CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY APPLIED CLEAR, RECENT DECISIONS OF THIS COURT, AND THERE IS NO CONFLICT AMONG THE CIRCUITS

A. The Court of Appeals Properly Applied the *Press-Enterprise* Standards

This Court should deny the petition for certiorari. In reversing the district court, the court of appeals did no more than follow this Court's decision in *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984). The ruling sought by petitioner would not only alter the present practice of open *voir dire* in district courts throughout the United States, it would have the effect of overruling this Court's decision in *Press-Enterprise*.

This Court has established that the First Amendment guarantees to the public and the press a right of access to criminal trials. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond News-*

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[2] Respondents did not request, and the court of appeals did not order, that the district court disregard the *voir dire* it had already conducted and begin again. The district court did so *sua sponte*.

papers, Inc. v. Virginia, 448 U.S. 555 (1980). Because "a presumption of openness inheres in the very nature of a criminal trial under our system of justice," *Richmond Newspapers*, 448 U.S. at 573, access to criminal trials may be denied only upon a showing that "the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *See Globe*, 457 U.S. at 606-07.

In *Press-Enterprise*, this Court ruled that the First Amendment right of access to trials included a right of access to *voir dire* proceedings. The trial court in *Press-Enterprise* had closed the *voir dire* in a rape/murder trial on the ground that the presence of the press would diminish the likelihood that prospective jurors would be candid, and refused to release transcripts of the *voir dire* after the trial on the ground that the persons questioned during *voir dire* had a general interest in privacy. 464 U.S. at 503-504.

This Court held that neither the trial court's candor concerns nor its privacy concerns was sufficient to justify closed *voir dire*. Emphasizing the historic importance of openness in our criminal justice system, and relying on *Richmond Newspapers* and *Globe*, the Court held that the "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." 464 U.S. at 510. For example, the Court noted that if a prospective juror in a rape case had herself been a rape victim, the embarrassment and trauma of the incident might understandably give rise to legitimate privacy concerns regarding *voir dire* examination. *Id.* at 512.

The Court made clear, however, that protection of the privacy interests of potential jurors is accomplished by informing the jurors that if they believe a legitimate privacy interest is likely to be infringed, they may "request an opportunity to present the problem to the judge

in camera but with counsel present and on the record." *Id.* The Court emphasized the respective roles of the judge and the prospective juror stating that "[b]y requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy." *Id.*

Under the district court's procedure in the present case, however, the only panel members required to make any affirmative request were those who wanted to be publicly examined. Those jurors had to stand up, leave the group, identify themselves to the marshal, and return to the jury lounge. Significantly, the prospective jurors knew that opting for public examination meant that their examination would come last, after the private examinations. (*See* Petitioner's Appendix H, at 58a.) The effect of these built-in disincentives to openness is reflected in the jurors' overwhelming acceptance of the district court's offer of closed examination, as compared with the "miniscule" number of privacy concerns expressed previously, when jurors were required to request affirmatively the sealing of any part of the transcript. (Petitioner's Appendix I, at 79a.)

The court of appeals aptly observed that the district court's procedure, rather than providing a valid basis for believing that a significant privacy interest was at stake, actually encouraged "closure based on possibly insignificant privacy interests." (Petitioner's Appendix A, at 13a.) The court of appeals correctly held that the district court was obligated to require that the prospective jurors themselves make an affirmative request for *in camera voir dire*. (Petitioner's Appendix A, at 12a-13a.)

This Court also made clear in *Press-Enterprise* that, even when the juror affirmatively seeks private examination, it is the obligation of the trial judge to ensure that only genuinely sensitive information is suppressed. 464

U.S. at 512-13. The juror's particular privacy interest must in each case "be balanced against the historic values we have discussed and the need for openness of the process." 464 U.S. at 512.[3]

That obligation was not fulfilled here. The district court expressly refused "to place a burden on anyone to have to articulate" reasons for choosing closed examination (Petitioner's Appendix I, at 74a) and, consequently, made no effort to balance any juror's perceived privacy interest against "historic values" and "the need for openness." Rather, the district court simply assumed that some of the prospective jurors might have legitimate privacy interests and left it to their "discretion" to decide on public or private examination. (Petitioner's Appendix H, at 58a.) The court of appeals correctly held that the district court's approach did not satisfy the *Press-Enterprise* requirement that the court make findings "that public interrogation of any individual member of the *voir dire* would 'touch[] on deeply personal matters that [the juror] has legitimate reasons for keeping out of the public domain.'" (Petitioner's Appendix A, at 9a (quoting *Press-Enterprise*, 464 U.S. at 511.).)

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[3] This requirement of individualized consideration of closure questions was consistent with and grounded in the Court's earlier decision in *Globe*, striking down a Massachusetts statute that required the exclusion of the press and public from the courtroom whenever, during trials for specified sexual offenses, a minor victim of a sexual assault testified. In *Globe*, the state tried to justify the blanket closure rule on the ground that the rule would encourage minor sex victims to come forward and testify willingly and accurately. 457 U.S. at 609. While acknowledging that the state's interest in protecting the psychological well-being of such minors was compelling, this Court held that even that interest did not justify a mandatory blanket closure rule. *Id.* at 607-08. Rather, the Court ruled that trial judges must consider various factors—including whether the witness requested closure—and determine, on a case-by-case basis, whether a particular witness's testimony should be closed to the public. *Id.*

Finally, *Press-Enterprise* mandated that no *voir dire* proceeding be closed without first considering alternatives to closure. The court of appeals faulted the district court for its failure to consider any alternatives to closure—including the obvious alternative, contemplated in *Press-Enterprise*, of conducting *voir dire* in open court and responding to a juror's individual privacy concerns when raised by the juror. (Petitioner's Appendix A, at 13a-14a.)[4]

Petitioner argues that the provision of transcripts was a reasonable alternative designed to accommodate First Amendment rights. (Petition at 25-28.) In *Press-Enterprise*, however, this Court made clear that the provision of a transcript does not relieve the trial court of its obligation to conduct open proceedings. 464 U.S. at 512. It is only if the *Press-Enterprise* standards for closure have been met that the question of a transcript even arises. *Id.*

That rule is also confirmed by this Court's decision in *Globe*. The statute at issue in *Globe* allowed for the availability of transcripts of the closed proceedings, but that did not render closure of the proceedings constitutionally permissible. *Globe*, 457 U.S. at 610-11. The *Press-Enterprise* and *Globe* decisions reflect the principle that a transcript is not an adequate substitute for direct observation of proceedings in open court. Not only does a transcript not reflect the demeanor of the court, counsel and the witnesses, but, also, transcripts are not immediately available, and, when prepared on short notice, often contain substantial typographical errors. They are also expensive, costing hundreds of dollars per day.

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[4] Petitioner contends that the court of appeals ignored *Press-Enterprise*'s concern with the right to a fair trial. (Petition at 23-25.) In fact, concern about juror candor is an inherent part of the *Press-Enterprise* standard. And, as we have shown, the court of appeals properly applied each aspect of the *Press-Enterprise* test.

In any event, as this Court noted in *Globe*, the routine release of transcripts "hardly advances [the] interest" in keeping private matters secret. 457 U.S. at 610. That observation is particularly apt in this case, where the apparent overwhelming willingness of the prospective jurors to have the transcripts publicly released only further undermines the notion that they had any compelling privacy concerns to begin with.

B. There Is No Conflict Among the Circuits

Each of the two cases cited by petitioner as conflicting with the decision below is clearly distinguishable, and neither can be read to suggest that *Press-Enterprise* would not apply to a situation such as is presented here.

In *United States v. Edwards*, 823 F.2d 111 (5th Cir. 1987), a case involving the highly publicized bribery and racketeering trial of the governor of Louisiana, the district court closed midtrial chambers conferences with jurors who were alleged to have discussed the possibility of accepting bribes. An earlier trial had ended in a mistrial amidst similar allegations. *See Edwards*, 823 F.2d at 113. The court of appeals affirmed, concluding that *Press-Enterprise* did not apply because the conferences were not "supplemental *voir dire*," *id.* at 115, but were a type of proceeding that this Court "has been careful to insulate . . . from unwarranted intrusion by the press and public," *id.* at 116, and which has "traditionally been closed to the public," *id.* at 117. The *Edwards* court's refusal to apply the *Press-Enterprise* standards to "traditionally . . . closed" proceedings does not conflict with the court of appeals' application of those standards here to traditionally open *voir dire* proceedings.

In *In re Greensboro News Co.*, 727 F. 2d 1320 (4th Cir.), *cert. denied*, 469 U.S. 829 (1984), another highly publicized case involving the trial of Ku Klux Klan and Nazi members charged in the shooting deaths of anti-

Klan protesters, the district court closed the *voir dire* to the press and public and sequestered the prospective jurors from each other. The Fourth Circuit upheld the closure of *voir dire* shortly before this Court issued the *Press-Enterprise* decision. Two months later, and after the completion of *voir dire*, the *Greensboro* court explained, in a supplemental opinion, why it "did not . . . regard *Press-Enterprise Co.* as particularly close or relevant to the *Greensboro News Co.* case." 727 F.2d at 1327-28. The court explained that *Press-Enterprise* "concerned a general rule allowing the closing, for reasons of privacy rights protection, of *voir dire*," 727 F.2d at 1328. *Greensboro*, on the other hand, involved "unique" concerns, 727 F.2d at 1328 n.4, including, among other things, the need to relieve 750 prospective jurors of the fear of violent retribution if their *voir dire* testimony revealed strong opposition to the groups involved. 727 F.2d at 1325. The court doubted that any such unique circumstances would arise again. 727 F.2d at 1328 & n.4. Such circumstances differ dramatically from those in the present case.[5]

The only other circuit that has considered a trial court's closure of *voir dire* in light of *Press-Enterprise* has, like the court of appeals below, construed *Press-Enterprise* to bar closure of *voir dire*. *See United States v. Peters*, 754 F.2d 753 (7th Cir. 1985). No conflict exists.

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[5] Respondents brought *Greensboro* to the attention of the court of appeals, and distinguished it from the instant case. The court of appeals evidently saw no conflict with *Greensboro*.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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September 25, 1987

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 87-096

UNITED STATES OF AMERICA

v.

MICHAEL K. DEAVER

ORDER

In the exercise of its inherent power to provide for the orderly disposition of this case, it is, by the Court *sua sponte*, this 10th day of July, 1987,

ORDERED, as follows:

1. The press and the public will be admitted to the courtroom during jury selection only to the extent seating may be conveniently available. The transcript of *voir dire* proceedings at the bench and in the jury room, and the prospective jurors' completed questionnaires, will not be released until ordered by the Court after the trial is completed.

2. Any attempt by anyone, without leave of court, to communicate with a member of the jury panel respecting the case prior to selection of a jury, other than in the course of *voir dire*, and any attempt by anyone, without leave of court, to communicate with a member of the jury once selected respecting the case, other than in the course of trial, until the conclusion of the case, may be punished as a criminal contempt of court.

3. During the trial one side of the spectator section of the courtroom will be reserved for the press. If the number of journalists exceeds available seating, priority admission for one representative each will be granted in the following order:

(1) sketch artists (front row only); (2) local daily newspapers; (3) wire services (including affiliated radio networks); (4) non-local daily newspapers within national circulations; (5) local broadcast media; (6) national TV and radio networks; (7) weekly national news magazines; (8) all others. The public will be admitted to the press side of the courtroom only if seating remains available after all journalists have been seated.

4. The other side of the spectator section of the courtroom will be reserved for the general public. Journalists may be admitted to the public side of the courtroom only if seating remains available after all members of the public have been seated.

5. No media interviews whatsoever will be permitted in the courtroom at any time.

6. No members of the press or public will be admitted within the well of the courtroom at any time.

7. The courtroom will be cleared of press and public until 9:45 a.m., for the duration of the noontime recess, and at adjournment. The parties, counsel, and their staffs may be present in the courtroom at any time from 9:00 a.m. until 6:00 p.m.

8. Any violation of the foregoing, and any conduct the Court finds disruptive of the proceedings, may result in an order of temporary or permanent exclusion of the offender(s) from the trial.

/s/ _____

THOMAS PENFIELD JACKSON
U.S. District Judge

APPENDIX B

Partial Transcript of Closed *Voir Dire*
Proceedings, July 14, 1987

Next on my list is Frances Ingram and she has agreed to be questioned in open court.

Next one, 508, Cara Jablon, C A R A, J A B L O N. Number 508.

THE MARSHAL: Your honor, number 507 said can she change her mind, Ms. Ingram.

THE COURT: She wants to testify or she wants to answer questions in the jury room rather than in open court?

THE MARSHAL: When I discovered she was here I directed her to return to the juror's lounge, she said can I stay here, can I change my mind, I didn't go—

THE COURT: I intend to let her change her mind. All right. Before you bring in 508 bring in 507.

MR. SEYMOUR: Do you have questions?

MR. MILLER: Yes.

THE COURT: Please be seated, Ms. Ingram.

THE JUROR: Thank you.

THE COURT: You are very welcome.